Supreme Court, U.S.
FILED
SEP 11 2002
OFFICE OF THE CLERK

No. 02 414

In The
Supreme Court of the United States

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT,

Petitioner,

v.

DAVID M. CHAMPAGNE, SR., JIMMY GUILLORY, LINDA GUILLORY, CHRIS GREEN as co-tutor of the minor child, SETH LEBLANC, DEBORAH ELLENDER as co-tutor of the minor child, SETH LEBLANC, MARIA WAGUESPACK on behalf of the minor child, CYNTHIA WAGUESPACK, SILENCE DUPLANTIS, and DURPHY BOURQUE,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Sixteenth Judicial District Court, Iberia Parish

PETITION FOR WRIT OF CERTIORARI

RICHARD P. IEYOUB
Attorney General
State of Louisiana

LAWRENCE A. DURANT
General Counsel
Department of
Transportation and
Development
State of Louisiana

WILLIAM M. HUDSON, III
PATRICK B. MCINTIRE
Counsel of Record
LAWRENCE E. MARINO
OATS & HUDSON
A Partnership of Professional
Corporations
Gordon Square, Suite 400
100 East Vermilion Street
Lafayette, LA 70501
Telephone: (337) 233-1100

Attorneys For Petitioner
September 11, 2002

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

100 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether 23 U.S.C. § 409, which protects accident reports compiled or collected for purposes of highway safety evaluation from discovery or admissibility in civil litigation, applies to accident reports compiled for this purpose by police officers, rather than by highway department personnel.

2. Whether 23 U.S.C. § 409 applies to accident reports in the possession of the police officers who collected or compiled them for the purpose of highway safety evaluation.

3. Whether 23 U.S.C. § 402(k), which protects materials prepared in creating or maintaining a computerized traffic safety information database from admissibility or use in civil litigation, applies to accident reports used to provide the accident data for such a database.

PARTIES TO THE PROCEEDING

Not all parties to the proceeding in the Louisiana 16th Judicial District Court, the court whose judgment is the subject of this Petition, appear in the caption of this case, because all defendants other than Louisiana Department of Transportation and Development have settled or have been dismissed. The parties to the proceeding in the district court were:

1. David M. Champagne, Sr. (plaintiff);
2. Jimmy Guillory (plaintiff);
3. Linda Guillory (plaintiff);
4. Chris Green as co-tutor of the minor child, Seth LeBlanc (plaintiff);
5. Deborah Ellender as co-tutor of the minor child, Seth LeBlanc (plaintiff);
6. Maria Waguespack on behalf of the minor child, Cynthia Waguespack (plaintiff);
7. Silence Duplantis (plaintiff);
8. Durphy Bourque (plaintiff);
9. State of Louisiana, through the Department of Transportation and Development (defendant);
10. Wayne Conaway (defendant – settled);
11. State Farm Mutual Automobile Insurance Company (defendant – settled in capacity of insurer of Wayne Conaway; dismissed in capacity of uninsured motorist insurer of certain plaintiffs); and
12. Allstate Insurance Company (defendant – dismissed).

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	vii
Reports of Opinions	1
Statement of Jurisdiction	1
Statutory Provisions	1
Statement of the Case	2
Argument	5
I. *Certiorari* would enable more comprehensive treatment in another case where the Court has already granted *certiorari*	5
II. *Certiorari* is necessary to resolve a conflict between state courts of last resort regarding the applicability of Section 409 to accident reports	6
III. *Certiorari* is necessary to prevent judicial amendment and partial nullification of Section 409	9
A. The clear terms of Section 409 require protection of these accident reports	9
1. Accident reports are collected or compiled for the purpose of highway safety evaluation	11

TABLE OF CONTENTS – Continued

Page

2. Restricting application of Section 409 according to which department of government collects, compiles, or possesses materials is an improper judicial amendment of the statute 16

B. Congress has clearly indicated its intent to include accident reports within the scope of Section 409 18

1. Congress repeatedly overruled attempts to restrict the scope of Section 409, including an amendment to ensure that it encompasses accident reports 18

2. Restricting Section 409 from applying to accident reports because police compiled or possess them would partially nullify the statute, in violation of congressional intent 20

IV. Section 402(k) also protects the accident reports 23

Conclusion 25

Appendix

A. Judgment by Louisiana 16th Judicial District Court, Iberia Parish, Docket No. 91413-D, February 19, 2002 ..... App. 1

B. Denial of Application for Supervisory Writ by Louisiana Third Circuit Court of Appeal, Docket No. CW 02-00230, March 24, 2002 ..... App. 7

TABLE OF CONTENTS – Continued

Page

C. Denial of Application for Supervisory and/or Remedial Writs by the Supreme Court of Louisiana, Docket No. 2002-CC-1115, 817 So.2d 1161, June 14, 2002 ..... App. 9

D. Transcript of Hearing by Louisiana 16th Judicial District Court, Docket No. 91413-D, February 13, 2002 ..... App. 10

E. Statutory provisions ..... App. 50

Exhibits

1. Louisiana Uniform Motor Vehicle Traffic Crash Report (1999)

2. Louisiana Uniform Motor Vehicle Traffic Accident Report (1995)

3. NHTSA and FHWA, Model Minimum Uniform Crash Criteria, DOT HS 808 745 (August 1998) (excerpt; full text at www.nhtsa.dot.gov/people/perform/trafrecords/crash2002/pdf/MMUCCaugust98.pdf)

4. NHTSA, FHWA, and NAGHSR, *Model Minimum Uniform Crash Criteria*, DOT HS 809 001 (undated) (pamphlet)

5. NHTSA, *Research on Motor Vehicle Crashes and Injuries to Support Safety Programs*, DOT HS 807 304 (August 1997) (pamphlet)

6. NHTSA, *NCSA: National Center for Statistics & Analysis*, DOT HS 809 249 (June 2001) (pamphlet)

TABLE OF CONTENTS – Continued

7. USDOT, The Changing Face of Transportation, BTS00-007 (2000) (excerpt; full text at www.bts.gov/transtu/cft/)

8. Transcript of videotape, NHTSA, FHWA, *et al.*, Safety Starts with Crash Data (June 2002)

9. NHTSA, FHWA, *et al.*, Safety Starts with Crash Data (June 2002) (videotape) (unbound)

TABLE OF AUTHORITIES

Page

CASES

Champagne v. Conaway, 91,413-D (La. 16th J.D.C., Iberia Parish 2/19/02) 1

Champagne v. State of Louisiana, Department of Transportation and Development, CW-02-00230 (La. App. 3 Cir. 3/26/02) 1

Champagne v. State of Louisiana, Department of Transportation and Development, 2002-CC-1115 (La. 6/14/02), 817 So.2d 1161 1

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 9

Coniker v. State of New York, 695 N.Y.S.2d 492 (N.Y.Ct.Cl. 1999) 18, 20, 22

Fraley v. State of Louisiana, through its DOTD, 2001-CC-2467 (La. 9/7/01), 795 So.2d 1217 ..... 7, 16

Fry v. Southern Pacific Transp. Co., 30,540-CA (La.App. 2 Cir. 6/24/98), 715 So.2d 632, *writs denied*, 98-1986 (La. 10/30/98), 727 So.2d 1170, 98-2033 (La. 10/30/98), 728 So.2d 387 17

Fuester v. Consolidated Rail Corp., No. 91-09-013, 1994 Del. Super. LEXIS 383 (Del. Super. 7/12/94) 17

Guillen v. Pierce County, 31 P.3d 628 (Wash. 9/13/01), *cert. granted, Pierce County v. Guillen*, No. 01-1229, ___ U.S. ___, 2002 U.S. LEXIS 3044 (4/29/02) ..... *passim*

Irion v. State ex rel Dept. of Transp. and Dev., 98-CA-2616 (La. App. 1 Cir. 5/12/00), 760 So.2d 1220 ..... 7, 16

Jenkins v. Jefferson Parish Sheriff's Office, 402 So.2d 669 (La. 1981) 6

TABLE OF AUTHORITIES – Continued

Page

Kitts v. Norfolk and Western Rwy Co., 152 F.R.D. 78 (S.D.Va. 1993) 17, 18

Light v. State of New York, 560 N.Y.S.2d 962 (N.Y.Ct.Cl. 1990) 19

Martinolich v. Southern Pacific Transp. Co., 532 So.2d 435 (La. App. 1 Cir. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied, Louisiana Dept. of Transp. and Development v. Nick Martinolich, Inc.*, 490 U.S. 1109 (1989) 18, 19

Palacios v. Louisiana and Delta R.R. Inc., 98-CC-2932 (La. 7/2/99), 740 So.2d 95 7

Powers v. CSX Transp., Inc., 177 F.Supp.2d 1276 (S.D.Ala. 2001) 16

Reichert v. State, DOTD, 96-C-1419 c/w 96-C-1460 (La. 5/20/97), 694 So.2d 193 20

Rivers v. Hill, 2001-CC-2496 (10/10/01), 799 So.2d 486 7

Sevario v. State ex rel Dept. of Transp. and Dev., 98-CA-1302 (La. App. 1 Cir. 11/10/99), 752 So.2d 221 7

Southern Pacific Transp. Co. v. Builders Transp. Inc., No. 90-1377-N, 1993 U.S. Dist. LEXIS 7380 (E.D.La. 5/25/93) 17

Southern Pacific Transp. Co. v. Yarnell, 890 P.2d 611 (Ariz. 1995) 18, 19

Taylor v. Southwestern Rwy. Co., 746 F.Supp. 50 (D.Kan. 1990) 17

Walden v. Department of Transportation, 27 P.3d 297 (Alaska 2001) 22

TABLE OF AUTHORITIES – Continued

Page

Wiedeman v. Dixie Electric Membership Corp., 627 So.2d 170 (La. 1993), *cert. denied, Louisiana Dept. of Transp. and Development v. Wiedeman*, 511 U.S. 1127 (1994) 18, 19, 20, 21

STATUTES, STATUTORY MATERIALS, AND REGULATIONS

23 U.S.C. § 130 16

23 U.S.C. § 152 ..... *passim*

23 U.S.C. § 402 ..... *passim*

23 U.S.C. § 409 ..... *passim*

23 U.S.C. § 411 13

28 U.S.C. § 1257 1

Pub. L. No. 93-87 (1973) 11

Pub. L. No. 102-240 (1991) 19

Pub. L. No. 104-59 (1996) 19

Pub. L. No. 105-178 (1998) 13

H.R. Rep. No. 104-246 (1995) 8, 20

23 C.F.R. § 924.9 11

23 C.F.R. § 924.13 11

23 C.F.R. § 1335.3 13

23 C.F.R. § 1335.5 13

LA. REV. STAT. ANN. § 32:398 15

LA. REV. STAT. ANN. § 36:401 6

LA. REV. STAT. ANN. § 36:501 6

LA. REV. STAT. ANN. § 40:1308 15

TABLE OF AUTHORITIES – Continued

Page

LA. REV. STAT. ANN. § 48:13 6

LA. REV. STAT. ANN. § 48:22 6

1938 La. Acts 286 15

1960 La. Acts. 216 15

MISCELLANEOUS

Louisiana Office of Risk Management, Annual Reports, www.state.la.us/orm/annrepts.htm 8

Louisiana Uniform Motor Vehicle Traffic Accident Report (1995) 12

Louisiana Uniform Motor Vehicle Traffic Crash Report (1999) 12

NHTSA, *NCSA: National Center for Statistics & Analysis*, DOT HS 809 249 (June 2001) 14

NHTSA, *Research on Motor Vehicle Crashes and Injuries to Support Safety Programs*, DOT HS 807 304 (August 1997) 14

NHTSA and FHWA, MODEL MINIMUM UNIFORM CRASH CRITERIA, DOT HS 808 745 (August 1998), www.nhtsa.dot.gov/people/perform/trafrecords/crash2002/pdf/MMUCCaugust98.pdf 13

NHTSA, FHWA, *et al.*, *Model Minimum Uniform Crash Criteria*, DOT HS 809 001 (undated) 13

USDOT, THE CHANGING FACE OF TRANSPORTATION, BTS00-007 (2000), www.bts.gov/transtu/cft/ 14

NHTSA, FHWA, *et al.*, SAFETY STARTS WITH CRASH DATA (June 2002) (videotape) 14

REPORTS OF OPINIONS

The denial of Petitioner's Application for Supervisory and/or Remedial Writs by the Supreme Court of Louisiana is published at *Champagne v. State of Louisiana, Department of Transportation and Development,* 2002-CC-1115 (La. 6/14/02), 817 So.2d 1161. App. 9. The opinion of the Louisiana Court of Appeal is not published, but is filed at *Champagne v. State of Louisiana, Department of Transportation and Development*, CW-02-00230 (La. App. 3 Cir. 3/26/02). App. 7. The opinion of the Louisiana District Court is not published, but is filed at *Champagne v. Conaway*, 91,413-D (La. 16th J.D.C., Iberia Parish 2/19/02). App. 1.

STATEMENT OF JURISDICTION

The denial of Petitioner's Application for Supervisory and/or Remedial Writs was entered by the Supreme Court of Louisiana on June 14, 2002. App. 9. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS

A. 23 U.S.C. § 152. Hazard elimination program.

See Appendix E, App. 50, for text.

B. 23 U.S.C. § 402. Highway safety programs.

See Appendix E, App. 52, for text.

C. 23 U.S.C. § 409. Discovery and admission as evidence of certain reports and surveys.

See Appendix E, App. 62, for text.

STATEMENT OF THE CASE

On June 26, 1998, Tessie Duplantis ran a stop sign at the intersection of Louisiana Highway 88 and the eastbound lane of U.S. Highway 90. As she attempted to cross the intersection on Highway 88, a motor home driven by Wayne Conaway on Highway 90 struck her Dodge Neon. Five of Ms. Duplantis's passengers died in the collision. She received a traffic citation for "failure to yield," to which she plead guilty and paid a fine.

The surviving guest passengers and the survivors of the deceased passengers sued Mr. Conaway and his insurer, State Farm Mutual Automobile Insurance Company (State Farm); State of Louisiana, through its Department of Transportation and Development (DOTD); and the uninsured motorist insurers of two of Ms. Duplantis's passengers. Plaintiffs settled with Mr. Conaway and State Farm, and the uninsured motorist insurers were dismissed on Motion for Summary Judgment. DOTD is the only remaining defendant.

On July 5, 2001, Plaintiffs issued subpoenas duces tecum to Louisiana State Police Troop I and Iberia Parish Sheriff Sid Hebert, requesting production of:

> [A] certified copy of all records and reports of automobile accidents which occurred at the intersection of U.S. Highway 90 and Louisiana

State Highway 88 for the time period beginning January 1, 1995 through May 31, 2001.

DOTD moved to quash the subpoenas based on 23 U.S.C. §§ 402(k) and 409, which prohibit discovery or use of materials compiled or collected for highway safety evaluation purposes, because a purpose of the requested accident reports is to gather information to evaluate, prioritize, and obtain federal funding for highway safety enhancement.

Charles H. Miller, Jr., statistician and traffic records coordinator for the Louisiana Highway Safety Commission (LHSC), testified at the hearing on DOTD's Motion to Quash. Transcript, App. 24. LHSC is a component of the Louisiana Department of Public Safety (DPSC), as is the Louisiana State Police. App. 30. LHSC gathers accident reports prepared by all state and local police throughout Louisiana, and compiles them into a database of accident data. App. 26. Before LHSC enters the data, DOTD "spots" the accidents to identify their precise locations. App. 26-27. LHSC provides the finished database of accident report information to DOTD for use in the highway safety evaluation process. App. 26. LHSC has maintained this database since 1985 or 1986, before which it was maintained by the State Police. App. 27. The database is funded entirely by the federal government under Section 402, as is DOTD's accident-spotting function. App. 27, 32-33.

Hadi Shirazi, DOTD traffic safety engineer and hazard elimination fund coordinator for the Highway Safety Improvement Program, testified that DOTD uses the accident history database provided by LHSC for highway safety improvement. App. 31-32. DOTD combines LHSC's database compiled from the accident reports with DOTD's internal database of highway design information,

and uses the combined compilation to determine and obtain funding for appropriate highway safety enhancements. App. 31-32.

The trial court denied DOTD's Motion to Quash by Judgment dated February 19, 2002. Judgment, App. 1. In oral reasons for ruling issued on February 13, 2002, the trial court held that the accident reports were not protected because:

> The request for production of documents, those don't come to DOTD, but Louisiana State Police and the Sheriff of Iberia Parish, which falls under the auspices of [DPSC] and not [DOTD]. The accident reports compiled by the Sheriff of Iberia and [DPSC] were not established under the same auspices of 23 U.S.C. 409.

App. 44. Although the court did not address Section 402(k), the Judgment encompassed arguments based on this statute. *See* App. 1.

On March 26, 2002, the Louisiana Third Circuit Court of Appeal denied DOTD's Application for Supervisory Writ, stating that "there is no error in the trial court's ruling regarding production of the accident reports." App. 7. The court cited cases limiting Section 409 to documents in DOTD's possession. *Id.* On June 14, 2002, the Supreme Court of Louisiana denied DOTD's Application for Supervisory and/or Remedial Writs. App. 9.

ARGUMENT

I. *Certiorari* would enable more comprehensive treatment in another case where the Court has already granted *certiorari*.

This Court recently granted *certiorari* to review a decision of the Washington State Supreme Court holding the 1995 amendment to Section 409 unconstitutional, in another case involving application of Section 409 to police accident reports. *Guillen v. Pierce County*, 31 P.3d 628, 655 (Wash. 9/13/01), *cert. granted, Pierce County v. Guillen*, No. 01-1229, ___ U.S. ___, 2002 U.S. LEXIS 3044 (4/29/02). Consideration of this case in conjunction with *Guillen* would enable the Court to treat Section 409 more comprehensively than through consideration of *Guillen* alone, because the issues herein complement those in that case.

A holding by this Court in *Guillen* that Section 409 is *constitutional* would not preclude courts from continuing to dilute it and defeat its purposes by *interpreting* it as not applying to documents such as these accident reports. The concurring opinion in *Guillen* advocated this very approach. *Id.*, 31 P.3d at 657. The holding in the present case squarely presents the issue whether accident reports compiled and held by police are within the scope of Section 409. Consideration of this case would enable the Court to address the statute's scope, as well as its constitutionality.

Also, the accident reports sought in *Guillen* were apparently requested from the department of local government that collected this raw data into final reports. Here, DOTD compiled the accident reports, but they are requested from the police agencies that initially collected them. DOTD, DPSC, and Louisiana Parish Sheriffs are separate legal entities from each other, as is likely the case

in most states. LA. REV. STAT. ANN. § 48:13, 22; LA. REV. STAT. ANN. § 36:401(A), 501(A); *Jenkins v. Jefferson Parish Sheriff's Office*, 402 So.2d 669, 671-72 (La. 1981). The independence and separate legal status of the agencies that compile, collect, and possess such raw data should make no difference to the application of Section 409, because the statute makes no such distinction. Nevertheless, the rulings in this case were based on the independence of DOTD from the police, and the issue is squarely presented here. Consideration of this case would enable the Court to address the impact upon Section 409, if any, of this independence.

Finally, this case also involves 23 U.S.C. § 402(k), while *Guillen* involves only Section 409. Section 402(k) provides a basis for protecting accident reports that is independent of Section 409, but likewise based on the use of these materials in highway safety evaluation. Consideration of this case would enable the Court to address the status of accident reports under the federal Highway Safety Act as a whole.

II. *Certiorari* is necessary to resolve a conflict between state courts of last resort regarding the applicability of Section 409 to accident reports.

Certiorari is necessary because decisions of state courts of last resort conflict as to whether Section 409 applies to accident reports held by one department of government that collected the reports for the purpose of assisting another department in evaluating highway safety. *See* S.Ct. Rule 10(b).

The Supreme Court of Louisiana has held that the applicability of Section 409 depends on whether DOTD or DPSC possesses the requested materials. *Fraley v. State of Louisiana, through its DOTD*, 2001-CC-2467 (La. 9/7/01), 795 So.2d 1217, 1217. *See also Rivers v. Hill*, 2001-CC-2496 (10/10/01), 799 So.2d 486, 486 (applying Section 409 to data held by DOTD but not to data held by DPSC); *Irion v. State ex rel Dept. of Transp. and Dev.*, 98-CA-2616 (La. App. 1 Cir. 5/12/00), 760 So.2d 1220, 1226 (refusing to apply Section 409 to documents *compiled* by DPSC). The Washington Supreme Court, on the other hand, held in *Guillen* that Section 409 applies (by its terms) to accident reports regardless of which department of government possesses them. *Guillen*, 31 P.3d at 645-46. *See also Palacios v. Louisiana and Delta R.R. Inc.*, 98-CC-2932 (La. 7/2/99), 740 So.2d 95, 101-02 (applying Section 409 to data held by DPSC); *Sevario v. State ex rel Dept. of Transp. and Dev.*, 98-CA-1302 (La. App. 1 Cir. 11/10/99), 752 So.2d 221, 230 (same).

The Louisiana Supreme Court has itself rendered conflicting decisions on this issue. First, in *Palacios*, the court applied Section 409 without regard to whether the protected information was in DOTD's or LHSC's database. *Id.*, 740 So.2d at 101-02. Then, without overruling or referring to *Palacios*, or even referring to Section 409, the court held in *Fraley* that discovery would be permitted if the requested information could be produced by DPSC without using DOTD's database. The court of appeal in the present case relied on *Fraley* without addressing *Palacios* or the Louisiana Supreme Court's abrupt and unexplained reversal of position.

The applicability of Section 409 to accident reports is an important issue because it arises frequently, and

significant potential liability depends on it. Many plaintiffs seek to use accident reports in road hazard cases, alleging that negligence in the state's highway design, construction, or maintenance caused the accidents in which the plaintiffs were injured. Plaintiffs argue that the fact that accidents occurred at these locations in the past, as shown in the accident reports, establishes negligence on the part of the state. Whether these accident reports fall within the scope of Section 409 is therefore an issue in many road hazard cases.

These road hazard cases are a significant issue for the State of Louisiana. The state defends over 200 such cases each year. (This figure does not include suits against municipalities or other political subdivisions, where the application of Section 409 may also be an issue.) Road hazard litigation is the single largest item in Louisiana's risk management budget. Office of Risk Management, Annual Reports, available online at www.state.la.us/orm/annrepts.htm. Each year, Louisiana spends tens of millions of dollars in road hazard litigation. Other states also have a significant interest in this issue. Thus, the scope of Section 409 is a matter that affects a multitude of lawsuits across the country.

Congress considered Section 409 to be important enough to enact it and to amend it twice to overcome attempts by state courts to weaken it, as discussed below. Most recently, Congress amended the statute to overturn decisions by Louisiana and other state courts excluding accident reports from its scope. H.R. Rep. No. 104-246, § 328, at 59 (1995). *Certiorari* is warranted to halt the Louisiana courts' renewed erosion of this federal statute and to resolve the split between state courts of last resort regarding this important issue.

III. *Certiorari* is necessary to prevent judicial amendment and partial nullification of Section 409.

The trial court and court of appeal refused to apply Section 409 to the accident reports in this case because they were compiled and held by police officers. However, this restriction is contrary to the clear terms of Section 409, which do not exclude data from the statute's scope for this reason. Further, the courts' reasoning would preclude Section 409 from applying to accident reports *at all*, contrary to Congress's clear intent to protect accident reports under the statute, because they are *always* compiled by police. *Certiorari* is necessary to reverse this judicial amendment and partial nullification of Section 409.

A. The clear terms of Section 409 require protection of these accident reports.

In interpreting a statute, this Court begins by determining whether its meaning is clear upon its face. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

Section 409 applies, in pertinent part, to materials meeting the following requirements:

> **(1)** Reports, surveys, schedules, lists, or data;
>
> **(2)** Compiled or collected;
>
> **(3)** For the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites or hazardous roadway conditions;
>
> **(4)** Pursuant to 23 U.S.C. § 152.

23 U.S.C. § 409.

The first element of Section 409 is met here because the accident reports are the raw "data" for DOTD's highway safety database. *See* Miller, App. 26-27; Shirazi, App. 31-32. The second element is met because the reports are "collected" by the police and "compiled" by DOTD into this database. *Id.*

As to the fourth element, Section 152 requires states, as a prerequisite to obtaining federal funding for highway safety improvement, to:

> [C]onduct and systematically maintain an engineering survey of all public roads to identify hazardous locations . . . , assign priorities for the correction of such locations . . . , and establish and implement a schedule of projects for their improvement.

23 U.S.C. § 152(a)(1). Thus, materials are compiled or collected "pursuant to Section 152" when they are used for conducting and maintaining this survey.

DOTD's highway safety database, into which DOTD collects the accident reports, *is* Louisiana's highway safety survey to identify hazardous locations and to prioritize their correction under Section 152. *See* Miller, App. 26-27; Shirazi, App. 31-32. DOTD uses this database to obtain federal funding to correct hazardous locations identified thereby. *See* Shirazi, App. 31-32. Thus, the fourth element is met.

This leaves only the third element of Section 409, regarding the purpose for compiling or collecting the accident reports. While it is commonly believed that accident reports are taken merely for "insurance purposes," that perception is incorrect. Rather, for the following reasons, collecting data for highway safety evaluation

has long been a purpose of accident reports, satisfying the third element.

1. Accident reports are collected or compiled for the purpose of highway safety evaluation.

Congress enacted Section 152 in 1973. Pub. L. No. 93-87, § 209(a) (1973). With this statute, Congress agreed to fund 90% of the cost of highway safety enhancements, but insisted upon objective analysis demonstrating the need for the enhancements. 23 U.S.C. § 152(a)(1). The regulations implementing Section 152, promulgated in 1979, require planning and evaluation of federally-funded enhancements based on accident histories. 23 C.F.R. §§ 924.9(a), 924.13(a). Thus, the federal highway safety program created a federal purpose for collecting and compiling accident data, to develop the accident histories necessary for federal funding.

As established by Mr. Miller and Mr. Shirazi, the police accident reports are the raw accident data for these federally-mandated accident histories in Louisiana. *See* Miller, App. 26-27; Shirazi, App. 31-32. Thus, the accident reports are collected and compiled for the purpose of highway safety evaluation. Louisiana has long collected and compiled accident reports for this purpose. *See* Miller, App. 27-28.

In fact, the accident reports are the *only* source of the accident data necessary for highway safety evaluation. It makes good sense for the data to be collected and compiled in this manner. Police officers already attend each accident to protect the scene and for other purposes, so it is a cost-effective and efficient division of labor for them to collect

information for highway safety evaluation purposes at the same time. It would be unnecessarily inefficient and prohibitively costly for DOTD to create and train a duplicate statewide agency to collect this information, when the police will be on the scene anyway and are well-qualified to collect the data. DOTD understands that all state and local governments collect and compile accident data for highway safety evaluation purposes solely from police accident reports, for the same reasons.

The highway safety evaluation purpose for accident reports is apparent from the content and structure of Louisiana's ccident report form itself. LHSC developed this form, in conjunction with DOTD, for use state-wide in order to enhance its usefulness for safety evaluation. *See* Uniform Motor Vehicle Traffic Crash Report (1999), Exhibit 1. The form requests information far beyond that needed only for "insurance purposes," to assess fault, or to assist crash participants in litigation. Rather, it requests information needed for systematic analysis to identify hazardous locations and develop responsive safety enhancements or enforcement countermeasures. For example, the form requests information regarding matters such as vision obscurements, traffic control, roadway conditions, road surface, and lighting. *See id.*[1] This data is essential to identifying and prioritizing safety problem areas, and is collected and compiled and used for this purpose, regardless of whether it can also be used for other purposes.

---

[1]The pre-1999 predecessor to this form, the Uniform Motor Vehicle Traffic Accident Report (1995), sought much the same information. *See* Exhibit 2.

Congress and the United States Department of Transportation (USDOT) have acknowledged the central role of police accident reports in highway safety evaluation. Congress enacted 23 U.S.C. § 411 in 1998 to encourage states to follow uniform guidelines in collecting accident information for federal-aid highway safety improvement programs, including Section 152. Pub. L. No. 105-178, § 2005(a) (1998). The regulations implementing Section 411 encourage use of the MODEL MINIMUM UNIFORM CRASH CRITERIA (MMUCC) for this purpose. *See* 23 C.F.R. §§ 1335.3, 1335.5; NHTSA and FHWA, MODEL MINIMUM UNIFORM CRASH CRITERIA, DOT HS 808 745 (August 1998), Exhibit 3. MMUCC is published by the National Highway Traffic Safety Administration (NHTSA) and the Federal Highway Administration (FHWA), component organizations of USDOT.

MMUCC specifically anticipates that the police will gather accident data for highway safety evaluation purposes: "MMUCC includes 75 minimum data elements that need to be collected by *police* at the crash scene." MMUCC, at 1 (emphasis added). MMUCC further recognizes that this data will be recorded in and obtained from accident reports:

> Data recorded on crash reports are computerized into a central electronic crash data file at the state level. These statewide motor vehicle crash databases provide the basic information for developing effective highway and traffic safety programs.

MMUCC, at 4. *See also Model Minimum Uniform Crash Criteria*, DOT HS 809 001 (undated), brochure issued by NHTSA, FHWA, and the National Association of Governors' Highway Safety Representatives, Exhibit 4 ("*Law*

enforcement officers play the critical role of collecting crash data on the scene, and the reports they file serve as the foundation for developing traffic safety programs." (emphasis added)).[2]

In June 2002, NHTSA, FHWA, and various state governmental organizations collaborated to release a videotape entitled SAFETY STARTS WITH CRASH DATA. Videotape, Exhibit 9, and Transcript of Videotape, Exhibit 8. This video was produced for distribution to police officers "to emphasize the importance [to highway safety evaluation] of collecting crash data in an accurate, complete, and timely manner at the scene of a crash." *Id.* The video repeatedly reminds police that their accident reports are essential to this purpose, such as through the following exhortation:

> As a law enforcement officer, you see hundreds of crashes that should never have happened. As you investigate, you discover the causes. You know that if these causes could be identified, more crashes will be prevented. By writing a detailed

---

[2] Numerous other publications by USDOT and NHTSA tout the importance of accident reports to highway safety evaluation. For example, the NHTSA brochure, *Research on Motor Vehicle Crashes and Injuries to Support Safety Programs*, DOT HS 807 304 (August 1997), Exhibit 5, reports that USDOT collects information from police accident reports in order to assemble two of the primary federal accident databases for highway safety evaluation purposes. Similarly, the NHTSA brochure, *NCSA: National Center for Statistics & Analysis*, DOT HS 809 249 (June 2001), Exhibit 6, reports that these same federal databases, as well as the State Data System, are produced for highway safety evaluation purposes by sampling police-reported crash files. *See also* USDOT, THE CHANGING FACE OF TRANSPORTATION, BTS00-007 (2000) at 3-25, Exhibit 7 (same).

> report of the factors involved in each crash, you take on a leadership role in crash prevention. Your good work will give traffic safety professionals the facts they need to make changes that can save lives and property.

Id. Thus, collecting and compiling data for use in highway safety evaluation is not merely an afterthought or a use to which accident reports are sometimes put after they are taken for other, unrelated reasons. Rather, accident reports are intended for use in highway safety evaluation, even at the moment the police fill them out.[3]

Highway safety evaluation is and has long been a purpose for which accident reports are compiled and collected.[4] Accordingly, the accident reports meet each element required for application of Section 409, and therefore fall within the scope of its protection as provided by Congress.

---

[3] Even before 1973, highway safety evaluation was *a* purpose for which Louisiana collected and compiled accident information. *See* LA. REV. STAT. ANN. § 32:398(J), enacted by 1938 La. Acts 286, § 13; LA. REV. STAT. ANN. § 40:1308(B, C), enacted by 1960 La. Acts 216, § 3. The federal highway program added a *federal* purpose for the accident reports, beginning in the 1970s.

[4] In its *amicus* brief in *Guillen*, the United States argues that the accident reports in that case are not protected by Section 409 because they were not collected or compiled for the purpose of highway safety evaluation. *Id.*, Brief for the United States, 2002 WL 1560236, at 28-32. This premise is incorrect, at least in the present case, for the reasons stated herein.

2. Restricting application of Section 409 according to which department of government collects, compiles, or possesses materials is an improper judicial amendment of the statute.

In refusing to apply Section 409 to the accident reports, the trial court relied upon *Irion*, 760 So.2d at 1226, which restricted Section 409 to reports compiled or collected by DOTD, as opposed to DPSC. *See* App. 43-44. In affirming, the court of appeal relied upon *Fraley*, 795 So.2d at 1217, which restricted Section 409 to materials possessed by DOTD, as opposed to DPSC. Both decisions are erroneous because it is irrelevant to Section 409 which government agency collected, compiled, or possessed listed materials.

Congress drafted Section 409 in the passive voice, without even mentioning the compiler, collector, or possessor of the listed materials. By its clear terms, the statute applies to *all* materials compiled or collected for highway safety evaluation purposes, regardless of which department of government compiled or collected it, or who possesses it. Had Congress intended to restrict Section 409 on this basis, it could and would have said so. To the contrary, Congress amended the statute in order to *overturn* state court rulings imposing such restrictions, as discussed below.

Some courts have even applied Section 409 to documents collected, compiled, or possessed by private railroad companies for safety evaluation purposes under 23 U.S.C. § 130 (analogous to Section 152), citing Congress's use of the passive voice and the fact that the railroads play a significant role in identifying hazards. *E.g., Powers v. CSX Transp., Inc.*, 177 F.Supp.2d 1276, 1277 n.1 (S.D.Ala.

2001); *Fry v. Southern Pacific Transp. Co.*, 30,540-CA (La.App. 2 Cir. 6/24/98), 715 So.2d 632, 637, *writs denied*, 98-1986 (La. 10/30/98), 727 So.2d 1170, 98-2033 (La. 10/30/98), 728 So.2d 387; *Fuester v. Consolidated Rail Corp.*, No. 91-09-013, 1994 Del. Super. LEXIS 383 (Del. Super. 7/12/94), at *4-9; *Southern Pacific Transp. Co. v. Builders Transp. Inc.*, No. 90-1377-N, 1993 U.S. Dist. LEXIS 7380 (E.D.La. 5/25/93), at *39-42; *Taylor v. Southwestern Rwy. Co.*, 746 F.Supp. 50, 54 (D.Kan. 1990). *But see Kitts v. Norfolk and Western Rwy Co.*, 152 F.R.D. 78, 82 (S.D.Va. 1993). Police also play a significant role in highway safety evaluation, as described above. Moreover, the case is stronger for materials prepared by the police to assist Louisiana in conducting the analysis required for federal highway safety funding, than for railroads, which are private entities acting on their own behalf. *A fortiori*, Section 409 applies to documents collected, compiled, or held by the police.

In sum, it is the *purpose* for which the accident reports are collected or compiled that determines whether they are within the scope of Section 409, not who collected or compiled them, or who possesses them. Whether police or DOTD personnel do the collecting and compiling, highway safety evaluation is a purpose for which highway accident reports are collected and compiled.

By restricting Section 409 to documents collected, compiled, or possessed solely by DOTD, the trial court and court of appeal have judicially amended Section 409 to add requirements that Congress did not impose. It is not the role of the courts or the states to amend congressional enactments. Moreover, for the following reasons, judicial amendment to exclude these accident reports from the scope of Section 409 is particularly egregious because

Congress deliberately overruled similar restrictions added by Louisiana courts in the past.

B. Congress has clearly indicated its intent to include accident reports within the scope of Section 409.

Beyond the fact that Section 409 protects the accident reports on its face, Congress has demonstrated its intent to protect accident reports.

1. Congress repeatedly overruled attempts to restrict the scope of Section 409, including an amendment to ensure that it encompasses accident reports.

Historically, Louisiana courts (and others) have been hostile to Section 409, and several have adopted interpretations that diluted its application and minimized its scope, often citing concerns for preservation of liberal discovery standards. *E.g., Martinolich v. Southern Pacific Transp. Co.*, 532 So.2d 435, 439 (La. App. 1 Cir. 1988), *writ denied*, 535 So.2d 745 (La. 1989, *cert. denied, Louisiana Dept. of Transp. and Development v. Nick Martinolich, Inc.*, 490 U.S. 1109 (1989); *Wiedeman v. Dixie Electric Membership Corp.*, 627 So.2d 170, 173 (La. 1993), *cert. denied, Louisiana Dept. of Transp. and Development v. Wiedeman*, 511 U.S. 1127 (1994); *Southern Pacific Transp. Co. v. Yarnell*, 890 P.2d 611, 614-15 (Ariz. 1995); *Kitts*, 152 F.R.D. at 80-81. However, each time that the state courts have interpreted Section 409 restrictively, Congress has amended the statute to preserve and bolster it. *Coniker v. State of New York*, 695 N.Y.S.2d 492, 495 (N.Y.Ct.Cl. 1999).

First, some courts held that Section 409 precluded only *admissibility*, but not *discovery*, of listed materials. *Martinolich*, 532 So.2d at 439; *Light v. State of New York*, 560 N.Y.S.2d 962, 965 (N.Y.Ct.Cl. 1990). Congress then amended the statute to proscribe discovery as well as admissibility of these materials. Pub. L. No. 102-240, § 1035(a) (1991).

Later, the Louisiana Supreme Court held that Section 409 applied to studies and compilations regarding highway safety evaluation, but not to the accident reports, traffic counts, or raw data "collected" by the state in order to draft those studies and compilations. *Wiedeman*, 627 So.2d at 173. *See also Yarnell*, 890 P.2d at 614-15. Congress then amended the statute to add the words "or collected," in order to protect the raw data along with the finished report. Pub. L. No. 104-59, § 323 (1996).

To emphasize its point, Congress published a clarification to explain its purpose for the amendment:

> This section amends section 409 of title 23 to clarify that data "collected" for safety reports or surveys shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.
>
> This clarification is included in response to recent State court interpretations of the term "data compiled" in the current section 409 of title 23. It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such data.

H.R. Rep. No. 104-246, § 328, at 59 (1995). This amendment has been widely interpreted as a direct response to *Wiedeman*:

> § 409 was amended to include the words "or collected" after "compiled" to effectively eliminate the admissibility of "accident reports, traffic counts, and other raw data collected by the Department" allowed by the holding in *Wiedeman v. Dixie Electric Membership Corporation*. This clarification was added in response to recent state court decisions, like *Wiedeman*, that in the view of Congress, misinterpreted the term "data compiled."

Reichert v. State, DOTD, 96-C-1419 c/w 96-C-1460 (La. 5/20/97), 694 So.2d 193, 198; *see also Coniker*, 695 N.Y.S.2d at 495.

In accepting federal highway safety funds subject to this condition, the states have consented to this condition, and Congress has repeatedly demonstrated its intent to preclude state courts from circumventing it. Although evidentiary restrictions are generally interpreted narrowly, Section 409 must be interpreted to give full effect to this intent.

2. Restricting Section 409 from applying to accident reports because police compiled or possess them would partially nullify the statute, in violation of congressional intent.

As discussed above, the accident reports are the raw accident data required for highway safety evaluation pursuant to Section 152. The *only* way these data *are* or realistically *can be* gathered is by police officers at accident scenes. *See* above.

In short, it will *always* be police who collect accident data. Accordingly, a rule of law that accident reports are unprotected if police collect or compile them is the same thing as a rule of law that accident reports are *always* unprotected. This directly conflicts with and is essentially an improper judicial reversal of the act of Congress amending Section 409.

Similarly, if the accident reports are unprotected in the hands of the police who compiled them, plaintiffs who are denied the accident data through a direct request could circumvent Section 409 simply by requesting the data from the police. Protection of the accident reports in the possession of DOTD would be meaningless if plaintiffs could obtain the very same data from the police.

There can be no doubt that Congress was aware that the accident data necessary for highway safety evaluation would be compiled by the police in accident reports when it wrote Section 409 in such broad, unqualified terms. Congress therefore would have excluded accident reports from Section 409 if it had intended this result. Instead, after the *Wiedeman* decision, Congress did the exact opposite and amended Section 409 in order to *protect* accident reports. The rulings in this case would effectively reinstate the holding in *Wiedeman* (with its "collected" versus "compiled" distinction), which the 1995 amendment was plainly intended to overturn.

Allowing the admission of accident reports obtained from state or local police also has the potential to create a particularly unfair imbalance – one which could not have been intended by Congress. At least one court has indicated that Section 409 is an absolute evidentiary bar, not simply a privilege to be invoked or waived by DOTD.

Coniker, 695 N.Y.S.2d at 495-97; *but see Walden v. Department of Transportation*, 27 P.3d 297, 304-05 (Alaska 2001). Although this issue is not directly raised by the circumstances of the present case, it has critical ramifications for the proper interpretation of the scope of Section 409. Numbers of accidents alone can be misleading without the perspective afforded by the data compilations and reports that are universally acknowledged to fall within the scope of Section 409's protection. Seventy accidents in a year at one intersection may be a lower rate than five accidents in a year at another intersection, depending on traffic volumes. If plaintiffs are allowed to introduce or rely upon the accident reports showing the numbers of accidents – each time arguing, "How many people have to be hurt or killed before DOTD does something about these accidents?" – yet DOTD is precluded from introducing the studies that show that the intersection at issue has a lower accident rate than many other intersections, DOTD will be unfairly prejudiced. Such a result cannot have been intended by Congress.

Thus, while not directly ruling Section 409 unconstitutional *de jure*, the courts in this case have nullified it *de facto*. This indirect attack undermines the statute and the congressional intent to protect accident reports embodied in the 1995 amendment as effectively as the direct ruling of unconstitutionality in *Guillen*. The Louisiana state courts have indicated that they will not counter this circumvention of congressional intent, leaving only this Court to uphold Section 409 and to ensure that it is given proper effect. *Certiorari* is warranted to preclude such judicial nullification of the statute.

IV. Section 402(k) also protects the accident reports.

In addition to the protection afforded by Section 409, Section 402(k) provides that:

> Notwithstanding any other provision of law, if a report, list, schedule, or survey is prepared by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

23 U.S.C. § 402(k)(1). Section 402(k) provides federal funds for states to create a "comprehensive computerized safety recordkeeping system designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways." *Id.*

Thus, Section 402(k) applies to materials meeting the following requirements:

(1) Reports, lists, schedules, or surveys;

(2) Prepared by or for the State or political subdivision;

(3) Prepared under Section 402(k);

(4) Mentioning any matter out of which a suit or action for damages arises.

Section 402(k) and Section 409 overlap to a significant degree, but arise from different purposes. Section 409 precludes use in civil litigation of the federal highway safety evaluation process itself, including all materials used in this process, such as the accident reports. Section 402(k), on the other hand, precludes use in civil litigation

of the computerized database funded by the federal government for use in the highway safety evaluation process. This database is not limited to any particular federally-funded safety programs, and may be used to identify means to enhance safety through regulatory, educational, enforcement, and other enhancements, as well as through the Section 152 Hazard Elimination Program. Unlike Section 409, Section 402(k) does not require the accident reports to have been "compiled or collected" for highway safety evaluation purposes. This statute requires only that the report was prepared "by or for the state or political subdivision" in creating the computerized accident database.

The accident reports *are* "reports, lists, and schedules" of accident data, satisfying the first element. The reports were prepared both "by" and "for" the state or its political subdivisions, satisfying the second element.

LHSC creates the database of accident and other information required under Section 402(k) using the accident reports prepared by state and local police. *See* Miller, App. 26-27; Shirazi, App. 31-32. As discussed above, this use of the accident reports is intended at the moment the data is collected, and the raw accident data are always collected by the police through the accident reports. Accordingly, the accident reports are prepared in the process of creating the computerized database required by Section 402(k), and are therefore prepared "under" this statute. This satisfies the third element of the statute.

Finally, the accident reports sought by Plaintiffs in this case relate to the intersection where Ms. Duplantis's accident occurred. Plaintiffs' claims allegedly arise out of that intersection, which they allege was defectively designed.

Thus, the fourth and final element of Section 402(k) is satisfied.

Accordingly, in addition to Section 409, the elements of Section 402(k) are also met with respect to these accident reports, precluding discovery of these materials.

CONCLUSION

Given the large number of cases and the significant potential liability that may be affected by this issue throughout the country, the potential impact on highway safety data collection and use, and the fact that the Court has already granted *certiorari* on the closely-related issue of the constitutionality of Section 409, DOTD respectfully submits that granting *certiorari* is proper and warranted in this case, and that the Court should grant this writ and consider this case together with the *Guillen* case.

Respectfully submitted, this 11th day of September, 2002.

HON. RICHARD P. IEYOUB
Attorney General
State of Louisiana

LAWRENCE A. DURANT
General Counsel
Department of
Transportation and
Development
State of Louisiana

WILLIAM M. HUDSON, III
PATRICK B. MCINTIRE
Counsel of Record
LAWRENCE E. MARINO
OATS & HUDSON
A Partnership of Professional
Corporations
Gordon Square, Suite 400
100 East Vermilion Street
Lafayette, LA 70501
Telephone: (337) 233-1100

Attorneys for Petitioner

APPENDIX

A. Judgment by Louisiana 16th Judicial District Court, Docket No. 91413-D, February 19, 2002.....App. 1

B. Denial of Application for Supervisory Writ by Louisiana Third Circuit Court of Appeal, Docket No. CW 02-00230, March 24, 2002.....App. 7

C. Denial of Application for Supervisory and/or Remedial Writs by the Supreme Court of Louisiana, Docket No. 2002-CC-1115, June 14, 2002.....App. 9

D. Transcript of Hearing by Louisiana 16th Judicial District Court, Docket No. 91413-D, February 13, 2002.....App. 10

E. Statutory provisions .....App. 50

APPENDIX A

DAVID M. CHAMPAGNE, SR., ET AL.	**DOCKET NO. 91413-D**
VS.	**16TH JUDICIAL DISTRICT COURT**
WAYNE CONAWAY, ET AL.	**IBERIA PARISH, LOUISIANA**

JUDGMENT

This matter came on for hearing on February 13, 2002 on Plaintiffs' Motion in Limine, Defendant's Motion to Quash and Defendant's Motion in Limine.

Present were:

Morris M. Haik, representing the Plaintiff's, Durphy Bourque and Silence Duplantis,

Louis M. Corne, representing the Plaintiffs, Cynthia Waguespack and Christopher Green as co-tutor of the minor child, Seth LeBlanc,

Mark G. Artall, representing the Plaintiffs, David Champagne, Sr., Jimmy Guillory, Linda Guillory and Debra Ellender as co-tutor of the minor child Seth LeBlanc,

Sonia Mallet, representing the Defendant, State of Louisiana through the Department of Transportation and Development,

Michael D. Zelden, representing the Defendant, State of Louisiana through the Department of Transportation and Development, and

Michael C. Barron, representing the Defendant, State of Louisiana through the Department of Public Safety.

After considering the evidence, the exhibits, the briefs, and the argument of counsel:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion in Limine seeking to prohibit the Defendant, STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT from offering testimony, proof, documentation or discussion of the finding of marijuana in the vehicle of Tessie Duplantis is hereby granted.

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion in Limine seeking to prohibit the Defendant, STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT offering of testimony, proof, documentation or discussion of the blood alcohol content of Tessie Duplantis is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT's Motion to Quash Plaintiffs' subpoena duces tecum to Sheriff Sid Hebert, Iberia Parish Sheriff's Department requesting certified copies of all records and reports of automobile accidents which occurred at the intersection of U.S. Highway 90 and Louisiana State Highway 88 for the time period beginning January 1, 1995 through May 31, 2001 is hereby denied and that the said Sid Hebert, Iberia Parish Sheriff's Department is hereby ordered to produce the requested records without delay.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION

AND DEVELOPMENT's Motion to Quash Plaintiffs' subpoena duces tecum to the Records Custodian of the Louisiana State Police Troop I requesting certified copies of all records and reports of automobile accidents which occurred at the intersection of U.S. Highway 90 and Louisiana State Highway 88 for the time period beginning January 1, 1995 through May 31, 2001 is hereby denied and that the said Records Custodian of the Louisiana State Police Troop I is hereby ordered to produce the requested records without delay.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT's Motion to Quash Plaintiffs' subpoena duces tecum to Acadian Ambulance Service requesting certified copies of all records and reports of automobile accidents which were responded to by Acadian Ambulance Service that occurred at the intersection of U.S. Highway 90 and Louisiana State Highway 88 for the time period beginning January 1, 1995 through June 1, 1998 is hereby denied. Admissibility determinations are deferred to the trial on the merits.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Motion in Limine relative to the information submitted to the Federal Highway Administration by the State of Louisiana through the Department of Transportation and Development is hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Motion in Limine to exclude any and all newspaper articles, reports, etc. regarding automobile accidents at the intersection of U.S. Highway

90 and Louisiana Highway 88 is hereby denied to the trial on the merits.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Motion in Limine for all plans, contracts, studies, and/or proposals relating in any way to the construction and/or reconstruction of any feature or aspect of the intersection U.S. Highway 90 and Louisiana Highway 88, including but not limited to any and all environmental assessments for proposed construction/reconstruction of U.S. Highway 90 interchange at Louisiana Highway 88 is granted with the exception of the original construction plans which have already been turned over to plaintiffs.

Judgment signed in Franklin, Louisiana this 19th day of February, 2002.

/s/ William D. Hunter
DISTRICT JUDGE

Respectfully submitted,

By: /s/ Louis Corne
LOUIS CORNE (4407)
Post Office Box 5146
Lafayette, Louisiana 70502-5146
(337) 264-1160
Attorney for Cynthia Waguespack and
Christopher Green

By: /s/ Morris M. Haik
MORRIS M. HAIK, JR. (17578)
110 West Washington Street
New Iberia, Louisiana 70560
(337) 560-4357
Attorney for Durphy Bourque and Silence Duplantis

By: /s/ Mark G. Artall
MARK G. ARTALL (21227)
111 East Main Street, Ste. 108
Lafayette, Louisiana 70501
(337) 233-1777
Attorney for David Champagne, Sr., Jimmy Guillory, Linda Guillory, and Debra Ellender as Co-Tutor of the minor child, Seth LeBlanc

By: /s/ Sonia Mallett
SONIA MALLETT (20511)
556 Jefferson Street, 4th Floor
Lafayette, Louisiana 70501
(337) 262-1700
Louisiana Department of Transportation and Development

By: /s/ Michael D. Zelden
MICHAEL D. ZELDEN (13768)
556 Jefferson Street, 4th Floor
Lafayette, Louisiana 70501
(337) 262-1700
Louisiana Department of Transportation and Development

By: /s/ Michael C. Barron
MICHAEL C. BARRON (2825)
265 South Foster Street
Post Office Box 66614, Drawer 11
Baton Rouge, Louisiana 70896
(225) 752-5512
Attorney for Louisiana Department of Public Safety

Filed Feb. 19 2002
Signed: Jule T. Badeaux, Dty. Clk.
A True Copy:

ATTEST: /s/ Cynthia C. Kein
Dty. Clerk of Court
Iberia Parish, La.

APPENDIX B

STATE OF LOUISIANA

COURT OF APPEAL, THIRD CIRCUIT

NO: CW 02-00230

DAVID M. CHAMPAGNE, SR., ET AL.
VERSUS
STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION & DEVELOPMENT

FILED: 02/25/02

On application of State of LA., DOTD for SUPERVISORY WRIT in No. 91413-D on the docket of the Sixteenth Judicial District, Parish of Iberia, Honorable William D. Hunter.

Michael Carl Barron Michael David Zelden Sonia Mallett	Counsel for: State of LA., DOTD
Louis Meraux Corne	Counsel for: Chris Green
Louis Meraux Corne	Counsel for: Cynthia Waguespack
Morris Michael Haik, Jr.	Counsel for: Silence Duplantis
Morris Michael Haik, Jr.	Counsel for: Durphy Bourque
Mark Gerard Artall	Counsel for: David Champagne, Sr.
Mark Gerard Artall	Counsel for: Jimmy Guillory
Mark Gerard Artall	Counsel for: Linda Guillory

Mark Gerard Artall

Counsel for:
Deborah Ellender

Lake Charles, Louisiana, on March 26, 2002.

WRIT DENIED:

There is no error in the trial court's ruling regarding production of the accident reports. *Rivers v. Hill*, 2001-2496 (La. 10/10/01); 799 So.2d 486 and *Fraley v. State of Louisiana, Department of Transportation and Development*, 01-2467 (La. 9/7/01), 795 So.2d 1217. As to the evidence regarding marijuana, the trial court did not abuse its discretion in prohibiting introduction of such evidence. Accordingly, the writ is hereby denied.

/s/ S.R.C.	/s/ O.A.D	/s/ G.B.G.
S.R.C.	O.A.D.	G.B.G.

APPENDIX C

817 So.2d 1161

THE SUPREME COURT OF THE STATE OF LOUISIANA

DAVID M. CHAMPAGNE, SR., ET AL.

NO. 2002-CC-1115

VS.

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION & DEVELOPMENT

IN RE: Transportation & Development Department of; Public Safety Department of; - Defendant(s); Applying for Supervisory and/or Remedial Writs, Parish of Iberia, 16th Judicial District Court Div. D, Nos. 91413-D; to the Court of Appeal, Third Circuit, No. CW 02-00230.

June 14, 2002

Denied.

CDT
PFC
CDK
BJJ
JPV
JTK
JLW

Supreme Court of Louisiana
June 14, 2002
/s/ Rai T. Daigle
Deputy Clerk of Court
for the Court

APPENDIX D

STATE OF LOUISIANA
16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA

DAVID CHAMPAGNE, ET AL *
VERSUS * DOCKET NO. 91413-D
WAYNE CONAWAY, ET AL *
* *

The hearings taken in connection with the above-captioned cause, before Bettye Keyes-Kaufman, Certified Court Reporter, in St. Mary Parish, Louisiana before The Honorable Judge William Hunter, on the 13th day of February 2002, beginning at 8:48 a.m.

[2] APPEARANCES:

FOR THE PLAINTIFFS, DAVID CHAMPAGNE, SR., JIMMY GUILLORY, LINDA GUILLORY, and DEBORAH ELLENDER:

MR. MARK G. ARTALL
ATTORNEY AT LAW
111 EAST MAIN STREET
LAFAYETTE, LA 70501

FOR THE PLAINTIFFS, CHRIS GREEN and CYNTHIA WAGUESPACK:

MR. LOUIS M. CORNE
ATTORNEY AT LAW
1014 WEST UNIVERSITY AVENUE
LAFAYETTE, LA 70506

FOR THE PLAINTIFFS, SILENCE DUPLANTIS and DURPHY BOURQUE:

MR. MORRIS M. HAIK, JR.
ATTORNEY AT LAW
110 WEST WASHINGTON STREET
LAFAYETTE, LA 70560

FOR THE DEFENDANT, STATE OF LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT:

MS. SONIA MALLET
ASSISTANT ATTORNEY GENERAL
556 JEFFERSON STREET, 4TH FLOOR
LAFAYETTE, LA 70501

MR. MICHAEL D. ZELDEN
ASSISTANT ATTORNEY GENERAL
P.O. BOX 91279
BATON ROUGE, LA 70802

FOR THE DEFENDANT, STATE OF LOUISIANA DEPARTMENT OF PUBLIC SAFETY:

MR. MICHAEL C. BARRON
ATTORNEY AT LAW
18610 GLENEAGLES DRIVE
BATON ROUGE, LA 70810-5971

INDEX

[3] TESTIMONY OF LIEUTENANT JOHN MEDLIN
EXAMINATION BY MR. BARRON..... 12
EXAMINATION BY MR. HAIK 17

TESTIMONY OF CHARLES MILLER
EXAMINATION BY MR. BARRON..... 20
EXAMINATION BY MR. HAIK 25
RE-EXAMINATION BY MR. BARRON..... 26

TESTIMONY OF HAADI SHIRAHZI
EXAMINATION BY MR. BARRON..... 28
EXAMINATION BY MR. HAIK 30

TESTIMONY OF DR. WILLIAM J. GEORGE
EXAMINATION BY MR. CORNE. 41
EXAMINATION BY MS. MALLET 43
RE-EXAMINATION BY MR. CORNE 44
RE-EXAMINATION BY MS. MALLET 55

OBJECTIONS:
None.

EXHIBITS:
Curriculum 42
Affidavit 67

(Exhibits retained by the Court)

REASONS FOR JUDGMENT 67

[4] **JUDGE HUNTER:** Have a seat, gentlemen. Let's hold it down. We have some motions prior to misdemeanor trials, and we're going to take them up now. How about Champagne versus Conaway? You gentleman ready to go?

MR. ZELDEN: Yes, your Honor.

JUDGE HUNTER: Excuse me, Mr. Senet, we just have a civil matter from New Iberia.

BAILIFF: Yes, your Honor. No problem.

JUDGE HUNTER: Okay, let's go. I understand the State of Louisiana has employed a reporter; is that right?

MR. ZELDEN: We have.

MS. MALLET: That's Bettye Kaufman and she's –

COURT REPORTER: Right here.

MS. MALLET: That's her.

[5] **JUDGE HUNTER:** Next time you do that, let me know. The next time you do that, let me know.

MS. MALLET: You asked us to hire a court reporter.

JUDGE HUNTER: I did – to hire – I didn't know – wonderful certified court reporter. Next time I've got to know who it is and then I've got to clear it with her, a little process that you don't know about. But we're okay. You're going to pay them, right?

MR. ZELDEN: Yes, your Honor.

JUDGE HUNTER: And I'm paying my regular reporter who's going to run backup. All right. Now, we're here today on a couple of motions, and I understand that Mr. Koury is – oh, that's the other thing. Will you make your appearances for the record?

MR. CORNE: Yes. Your Honor, I'm Louis Corne. I'm representing Cynthia Waguespack and Christopher Green. 1014 West University Avenue, Lafayette, [6] Louisiana.

MR. HAIK: I'm Morris Haik, Judge. I represent Durphy Bourque and Silence Duplantis, the plaintiffs.

MR. ARTALL: I'm Mark Artall here, your Honor, and I represent David Champagne, Deborah Ellender, and Linda and Jimmy Guillory.

MS. MALLET: I'm Sonia Mallet representing the State of Louisiana through the Department of Transportation and Development.

MR. ZELDEN: Michael Zelden representing the State of Louisiana through the Department of Transportation and Development.

MR. BARRON: Mike Barron representing the State of Louisiana through the Department of Public Safety.

JUDGE HUNTER: Okay. We'll take up first the Motion to Quash and/or Compel. Who wants to argue that?

MR. ZELDEN: [7] Which motion are we talking about, Judge? We have –

JUDGE HUNTER: Well, let me ask you this: Which motion would you like to start with first?

MR. ZELDEN: I'd be glad to start with my motion to quash the original subpoena duces tecum deposition to the records custodian of Troop I. That's the Louisiana State Police as well as the Sheriff of Iberia Parish.

JUDGE HUNTER: Fine, sir.

MR. ZELDEN: Thank you, your Honor. Pardon me, your Honor. If the Court please –

COURT REPORTER: Could you please come to the microphone?

MR. ZELDEN: Oh, I'm sorry. Hi, your Honor. If the Court please, I would hope that you had received a copy of my motion in limine and memorandum and support thereof, which I faxed to your office on Monday afternoon. You have [8] that. In connection therewith, if the court please –

JUDGE HUNTER: Does the Court have one?

CLERK: No, sir.

MR. ZELDEN: I will make sure the Court gets one, your Honor.

JUDGE HUNTER: This is an Iberia Parish case. That's probably which file it's in. Okay, go ahead.

MR. ZELDEN: Thank you, your Honor. If the Court please, there are – the two issues I wish to bring to the Court's attention and to emphasize this morning are – deal in my motion – in my memorandum and support of the motion in limine concerns the issuance of a subpoena duces tecum to the records custodian of Troop I, we have a State Police, to produce certain records relative to accident reports occurring at the intersection in Iberia Parish of L.A. 88 and U.S. Highway 90 for a period of time of January 1, 1995 through May 31, 2001. The Court's [9] attention is directed to the date of the accident being June 26, 1998. First of all, if the Court please, I think any accidents that occurred subsequent – any requests for reports subsequent to the date of the accident are irrelevant. As I appreciate, the plaintiff is attempting to obtain reports for this purpose of establishing notice on the part of DOTD with respect to an alleged hazardous intersection, would suggest that any report subsequent to the date of the accident irrelevant. Those reports prior thereto, if the Court please, I think are subject to several – protection afforded by several articles. The initial one I'd like to bring to the Court's attention is under Article 32:398 relative to the confidentiality of the accident reports. If the Court please, the statute enacted by the State Legislature clearly indicates that the acquisition of accident reports shall be exempt from the provisions of Title – of Article 44 – Title

44 rather, Article 1, et seq., of the – of Louisiana Revised Statutes, and that specifically deals with the public records law. As indicated in my memorandum, the key-words, I [10] think, in that particular article are the word "the" and the word "particular." The article goes on to say that these reports shall be available only to the parties of the accident, the parents or guardians of a minor who is a party to the accident, and insurers of any party who is the subject of the report, the succession representatives of those parties, or to the attorneys of the parties of the succession representatives, or to any news-gathering organization that requests documents related to the accident. It goes on to say that all persons and their agents are prohibited from screening accident reports if the person or his agent does not represent any of the parties involved in a particular accident, the report for which could be reasonably expected to be available. It goes on to say, however, this limitation shall not prevent any person from requesting particular reports, regardless of whether the person represents any party to the accident. If the Court please, I submit that the plaintiffs are not asking for any particular reports. They don't know when a particular accident occurred [11] at this particular intersection, and they do not know the names of any of the parties involved in those accidents. Secondly, if the Court please, the request does not indicate at which intersection – that is, the subpoena duces tecum does not indicate which intersection that these accidents are being requested. Obviously there's an eastbound intersection and a westbound intersection at U.S. 90 and L.A. 88. If the Court please, I suggest that these documents – accident reports are unavailable for discovery and/or inadmissable, first of all, in accordance with 32:398(K). Secondly, if the Court please, I suggest to you that the accident reports are also

inadmissible and undiscoverable under 23:409. And if the Court please, the subpoena duces tecum was directed to the records custodian for Troop I of Louisiana State Police in the Lafayette Troop. I have here the attorney for the Department of Public Safety who – Mr. Mike Barron, who I think is going to assist me, if the Court please, by introducing some testimony from the custodian of that Troop with respect to the availability of those [12] records, if the Court will indulge it.

MR. HAIK: No objection.

MR. BARRON: Thank you, your Honor. The State calls Lieutenant John Medlin.

LIEUTENANT JOHN MEDLIN,

after having been duly sworn, was examined and did testify as follows:

EXAMINATION BY MR. BARRON:

Q Would you state your name and work address for the record, please?

A Lieutenant John Medlin. 121 East Pont Du Mouton, Lafayette.

Q By whom are you employed?

A Louisiana State Police.

Q In what capacity?

A I'm the Troop Executive Officer.

Q Are you the records custodian for Louisiana State Police Troop I?

A Yes, I am.

Q Did you receive a subpoena in this matter of David Champagne, Sr. versus Wayne Conaway?

A Not for today. I'd received one last summer sometime.

[13] **Q** You didn't receive one for today. You received one for February the 7th in New Iberia?

A No, sir.

Q So the only thing you have received was the subpoena duces tecum for deposition for July of last year; is that correct?

A Correct.

Q Do you have any original traffic reports at Troop I?

A No, sir.

Q What happens to the originals?

A They're sent to the traffic records section in Baton Rouge.

Q Okay, and you don't receive any accident reports by local authorities, sheriffs, or municipal police parties?

A No, we don't.

Q Do you keep copies of these traffic reports?

Q [sic] Yes, we do.

Q For how far back do you keep those copies?

A We have a retention schedule through our policy and procedure manual. And for crash reports, it's three years.

Q What reliable method or methods do you have to pull traffic records at a given spot? For instance, in this case we're talking about U.S. – the [14] intersection of U.S. 90 and State Highway 88?

A The only reliable method would be to hand search all the crash reports.

Q If we were talking about all of the traffic accident reports from January 1 of '95 to May 31 of 2001, how many records would that be to go through?

A On an average, about 5,000 per year.

Q Do you have anybody available to go through those?

A We have three clerical personnel. That's true.

Q What do those secretaries – what do those clerical people do on a normal day?

A They process the crash reports on a daily basis, the citations, arrest reports. They process subpoenas. They're in charge of selling crash reports to the public along with other clerical duties.

Q Do they have anything to do with regard to sending license plates back to Motor Vehicles?

A Correct. Each morning we have to – any plates that are seized because of lack of proof of insurance are required to be at the Motor Vehicle office in Lafayette by 10:00 a.m.

Q Are any of your duties time-sensitive?

A Yes, they are.

Q Would there be a problem if a backlog was created?

A Yes.

[15] **JUDGE HUNTER:** Where are we going with this? I know it's going to be extremely difficult to do this, but are you asserting privilege on behalf of Department of Public Safety?

MR. BARRON: Your Honor, we are – at this point, as far as the custodian of Troop I, we're arguing that it's overly burdensome. We do reserve any privilege that may be applicable also. Yes, we are asserting privilege.

JUDGE HUNTER: Do you have a privilege? Do you have a statutory privilege?

MR. BARRON: Your Honor, yes, we do.

JUDGE HUNTER: As the Department of Public Safety?

MR. BARRON: The statutory privilege actually is 23U.S.C.409. We probably don't get to that, though, if we're just dealing with traffic – the custodian at Troop I. The departmental position is that, although Lieutenant Medlin is the custodian for copies of traffic reports, [16] he's not the custodian for the originals.

JUDGE HUNTER: Let me get this straight: You – the Department – you say the Department of Public Safety has the privilege under 23U.S.C.409?

MR. BARRON: That's one. That's one privilege, your Honor. We have another privilege under 32:398.

JUDGE HUNTER: A "yes" or "no" would be really good. Is that the privilege that you assert today?

MR. BARRON: That's one of the privileges, yes, sir.

JUDGE HUNTER: Okay. Please go ahead.

MR. BARRON:

Q In this particular case, how long would it take your clerical to pull the records that have been asked for between January of '95 and May 31 of 2001?

A We've never tried to complete a task of this magnitude before. But just an estimate, it would take two clerical people a minimum of 40 hours each to go through them, and probably more. It's hard, you know – I can't give a specific number, because we've never done it before. It would be a pretty [17] burdensome task.

Q Would that interfere with the normal functioning of Troop I?

A Yes, it would.

MR. BARRON: That's all the factual information I have at this time.

JUDGE HUNTER: Briefly.

MR. HAIK: Briefly.

EXAMINATION BY MR. HAIK:

Q Lieutenant, have you testified in court before?

A Yes, sir. I have.

Q Have you testified in a civil matter where an accident report was introduced into evidence?

A Yes, I have.

Q How long has the State Police, to your knowledge, been preparing accident reports?

A I imagine since the accident reports were invented. That's basically what our –

Q Since the beginning?

A Yes, sir.

Q And if accident reports were introduced into evidence in a case against DOTD, would the State [18] Police stop preparing accident reports?

A I don't understand your question.

Q Would the State Police discontinue the practice of preparing accident reports if accident reports were introduced into evidence against a case – against the DOTD?

A No, sir.

Q Now, the reports that have been subpoenaed can be obtained through a hand search; I believe that was your testimony, correct?

A Yes, sir.

Q That's all I have.

JUDGE HUNTER: Anything else?

BAILIFF: Does the Court have any questions of the witness?

JUDGE HUNTER: No. Thank you.

MR. BARRON: You may step down, Lieutenant.

JUDGE HUNTER: Does anybody have anything else?

MR. BARRON: If the Court please, I have Mr. Chuck [19] Miller from the Louisiana Highway Safety Commission ready to testify here this morning relative to the disposition of the reports once they're received from the Troop I, and what happens to those reports, and how DOTD gets involved with respect to the transaction over at –

JUDGE HUNTER: I'm going to – I'm running out of time here. So what we're going to do is send you all to – do I have a bailiff around here somewhere? There he is, right in front of me. Would you take these folks down to the conference room, you know, the attorney's conference room? We're going to take care of some business here and we can come back. This is going to take longer than I thought. I've got a couple hundred people waiting. I think I can handle that docket really quickly if you'd bear with me. I want to give you every opportunity – all sides to put on a record. So I think if you could just stay up close, ma'am, we'll get going.

MR. ZELDEN: Thank you, your Honor.

[20] PROCEEDING RECESSED AT 9:07 A.M.

– BREAK –

PROCEEDING CONTINUED AT 12:03 P.M.

JUDGE HUNTER: Court is back in session. Sorry it took so long. Sorry. I believe you had some more people you wanted to call?

MR. BARRON: Yes, your Honor. In regards to the Motion to Quash, the State calls Charles Miller.

CHARLES MILLER,

after having been duly sworn, was examined and did testify as follows:

JUDGE HUNTER: Right up here, have a seat.

EXAMINATION BY MR. BARRON:

Q Mr. Miller, could you give us your name and work address, please?

A Charles H. Miller, Jr. 265 South Foster Drive, Baton Rouge, Louisiana.

Q By whom are you employed?

A The Louisiana Highway Safety Commission.

Q For how long have you been so employed?

A Five and-a-half years.

Q And in what capacity?

[21] **A** The statistician and the traffic records coordinator.

Q Prior to be employed by the Louisiana Highway Safety Commission, where were you employed?

A Louisiana State Police.

Q In what capacity?

A I worked at Troop A in Baton Rouge for 20 years.

Q And for how long? For 20 years?

A For 20 years. Yes, sir.

Q Are you familiar with the Louisiana State Police traffic record database?

A Yes, I am.

Q Are you familiar with the database of the Louisiana Highway Safety Commission?

A Yes, I am.

Q Can you tell us what type of traffic records are kept in Baton Rouge with the Louisiana State Police Traffic Records Bureau?

A The Louisiana State Police is the curator of all original State Police traffic records. All the troops send the originals to Baton Rouge, and they are stored and potentially microfilmed in Baton Rouge.

Q Do you know how the State Police are able to pull up traffic records?

[22] **A** They sell and pull up traffic records through an image system, but one must provide – either an attorney or an insurance agent, or a person wanting a copy of a report, must provide the name of one of the drivers, the parish, the date, or someone who died in the accident. Those are the indexing pieces of information and how they store them.

Q If you asked the State Police Traffic Records Bureau for all of the accidents that occurred at a given

spot on a highway or a given intersection on State highways, will they give you those?

A They are unable to do that electronically.

Q To your knowledge, do they have any way of pulling up the information to find out all the accident reports at a given spot on a highway when there's a –

A No, sir. They do not.

Q Shifting over to the Louisiana Highway Safety Commission, do y'all keep the originals of any kind of traffic reports?

A No, sir. We get copies from the State Police and all other police agencies in Louisiana and enter all the data into a database.

Q Then what do you do with the copies once you've entered the data?

[23] **A** We throw them away.

Q Do you share any of this data with the Department of Transportation Development in Louisiana?

A Yes, sir. We do. We give them our copy of the database several times a year.

Q For what purpose do you share information with DOTD?

A We share them information – they participate in the process of data entry in that they actually do the spotting of the reports, and we share them – the information in its final form so they can use it for their problem identification process.

Q When you say "spotting," what does that involve?

A Taking each one of the reports and specifically going over each one and putting a mile post location on each accident for those accidents that occurred on State system roads, which are U.S. numbered highways or State numbered highways.

Q Why is that necessary? Isn't that information already on the traffic report?

A It – most police officers in the State put some sort of identifying mark, obviously the name of the highway. And most of them are directed to put an intersecting road, but many of them don't, and many of them put mile posts that they estimate from the wall of a map. So what DOTD does, before we do the [24] data entry, we give all the paper reports to DOTD. They look at each one. And they have their books and charts, and maps. And they put the exact pinpoint location, so they're able to tell at a later date exactly where all these accidents happened. They give the reports back to me, and then I have them data entered.

Q The database at the Highway Safety Commission, was that created with state or federal funds or a combination?

A Entirely federal money.

Q When was the database created?

A The Highway Safety Commission took over this function from the State Police in 1985 or '86 pursuant to 32:398, which states that the Department of Public Safety shall maintain this database of all crashes in Louisiana. And we have been operating under that since we are part

of the Department of Public Safety. We have been doing that function since the mid '80s sometime continuously since that point. Our whole database and our whole staff and everything we do is entirely federally funded.

MR. BARRON: Your Honor, that's all the questions I have for Mr. Miller. I tender for cross- [25] examination.

EXAMINATION BY MR. HAIK:

Q Mr. Miller, accident reports are prepared, collected, and compiled by Department of Public Safety; correct?

A Yes, sir.

Q And historically the purpose of preparing accident reports actually has nothing to do with obtaining federal funding; isn't that true?

A Accident reports are compiled, first of all, to document that an accident occurred. It's the only means that the State of Louisiana has to document on paper that something occurred at a location. After that, there's a myriad of reasons that they're used. I can't – I'm not able to say how – what – the horse became before the cart at one point. I just know what we do today.

Q Are you familiar with 23U.S.C.409?

A Yes, sir. I am.

Q Are you aware that the preparation of accident reports long predates the enactment of 23:409?

A Yes, sir. I am.

Q Isn't it true that the State Police prepares, collects, and stores accident reports by parish?

A Different troops have different ways of storing [26] them. I know that from my own experience. I know that some troops store them by the officer's name. Some do them by parish. It just depends on where you go. But the originals are not kept at the troops. The originals are sent to Baton Rouge.

Q The information that's contained at the troop may very well be stored by parish; correct?

A It would depend on the troop, yes, sir.

Q Were you here this morning when the Lieutenant testified?

A Yes, sir. I was.

Q The Lieutenant testified that the reports that are under subpoena by the plaintiffs in this matter can be collected by hand. Did you understand that?

A Yes, sir. I did.

Q I don't have any other questions.

JUDGE HUNTER: Do any of you gentlemen have questions?

MR. BARRON: Just a couple of quick questions in response.

RE-EXAMINATION BY MR. BARRON:

Q Mr. Miller, did you understand from Lieutenant Medlin's testimony that he had no originals at the troop?

[27] **A** Yes, sir.

Q All the originals were sent to headquarters?

A Yes, I did.

Q Is that consistent with your experience with State Police, the way it's supposed to be done?

A Yes, sir. It is.

Q Can you also delineate, for the record, where does the Highway Safety Division fit within the Department of Public Safety?

A We are a organizational part of public safety just as the State Police are, and Motor Vehicles and fire marshals.

Q So the Louisiana Highway Safety Commission is a subset of the Department of Public Safety; correct?

A Yes, sir.

Q Is there any affiliation between the Louisiana Highway Safety Commission and the Louisiana State Police, organizationally?

A Only because we're both part of the public safety.

Q Thank you, Mr. Miller. That's all the questions I have.

MR. BARRON: May Mr. Miller be excused, your Honor?

JUDGE HUNTER: Sure. I thought you'd like to stick [28] around and buy us lunch.

MR. BARRON: Your Honor, the State next calls Mr. Haadi Shirahzi (ph.).

HAADI SHIRAHZI,

after having been duly sworn, was examined and did testify as follows:

JUDGE HUNTER: Mr. Shirahzi, have a seat.

EXAMINATION BY MR. BARRON:

Q Would you state your name and work address for the record?

A My name is Haadi Shirahzi. 1201 Capitol Axis Road, Baton Rouge, Louisiana.

Q By whom are you employed?

A I'm employed by Louisiana Department of Transportation and Development.

Q In what capacity?

A I'm a traffic safety engineer and hazard elimination fund coordinator for Highway Safety Improvement Program.

Q How long have you been so employed?

A I'm working for Department of Transportation for ten years. At present position, close to two years.

Q Are you familiar with what the DOTD does with [29] information sent from a database of Louisiana Highway Safety Commission with regard to traffic records?

A Yes, I do.

Q What does DOTD need with that information?

A The information that comes from the Louisiana Highway Safety Commission, DPS, comes to us as a form

that we need to create to study to see how important the Highway Safety Improvement Program is, because we look at a geometric, and design the specification on that particular area and then maintain those – that program that Highway Safety has to our program to look at the geometric and surface description roadway, if it is a rural or urban area, to make a study and see if we can get the funds for highway improvement.

Q How is this information transmitted from the Louisiana Highway Safety Commission to DOTD? Electronically or by paper, or both?

A It's both. Most of what Mr. Miller does is bringing those traffic records to us. He map the spot and get the exact location where the accident happened, and then we give it back to Mr. Miller and take it back to DPS. Then he bring it back as a form of the CD ROM. At this time, he pass the tape program that [30] combine with our main – maintain program that we have which is combined with the accident history data program, which continuously be updated. And from that, we determine what we need to do from there.

Q Does DOTD keep a copy of the paper record in its offices anywhere?

A No, sir.

Q So the information you have is just stored electronically?

A Yes, sir.

Q With regard to the map-spotting function, is that federally funded our state funded?

A It's federally funded.

Q Do you know if it's funded through 23U.S.C.409?

A Yes, sir.

MR. BARRON: Your Honor, I tender for any questions the opponents may have.

EXAMINATION BY MR. HAIK:

Q Sir, accident reports are prepared by the State Police; correct?

A Accident report, yes. By State Police.

Q They're not prepared by the Department of Transportation and Development, are they?

[31] **A** We are not preparing those report. No, sir. If you're considering that, no. We are part of the putting the report together on the same form that Mr. Miller explain earlier, yes.

Q And the preparation of accident reports has long predated 23U.S.C.409; isn't that correct?

A Yes. As far as I know, yes.

Q That's all I have.

JUDGE HUNTER: Thank you. Anybody else? Thank you, sir.

MR. BARRON: May Mr. Shirahzi be excused, your Honor?

JUDGE HUNTER: Yeah, but nobody wants to leave. Go ahead, have a seat.

MR. BARRON: Your Honor, I think this is all the testimony we have on the Motion to Quash.

MR. ZELDEN: I lost my voice, your Honor. I'll try to get close. Can you hear me?

JUDGE HUNTER: Do you want to take a break and –

MR. ZELDEN: It's just been deteriorating since we went [32] in this morning.

JUDGE HUNTER: You can clear it all up with –

MR. ZELDEN: I don't want to take anymore breaks, your Honor.

JUDGE HUNTER: You can take a break with hot water and salt.

MR. ZELDEN: I've tried to – I've taken some medications and et cetera. I'd prefer to go on if the court reporter –

JUDGE HUNTER: Have at it.

MR. ZELDEN: If the court please, the remaining arguments that we have with respect to 409 as it pertains to the other issues in my motion, namely the newspaper articles, the – the – pardon me, your Honor.

MS. MALLET: Just a second.

MR. ZELDEN: [33] With respect to the newspaper articles, your Honor, that's contained in some of the exhibits which they wish to introduce into evidence, I'll bring the Court's attention – I'll bring the Court's attention to the case of Robertson, which I've cited in my brief, and suggest that this is all hearsay information, if the

Court pleases, and suggest that it's inadmissible and undiscoverable under 23:409. With respect to the highway plans and so forth, Exhibit No. 8 listed in the pretrial order, the same argument is made based on 23:409. And the traffic count issue, I think, has been included with the accident report that they've requested, and our argument has already been extended to you concerning that. The only other issue I want to bring to the Court's attention concerns the reports that they have subpoenaed from the Acadian Ambulance service with respect to copies of accident reports, and so forth, and so on. I have not received any – I don't know what has been responded to in connection with that subpoena. I don't know when it was returnable. It was subpoenaed to the Acadian Ambulance service. Has that been [34] returned yet?

MR. HAIK: I have not received it, not yet.

MR. BARRON: If the Court please, I would reserve my right to object to the admissibility of that evidence, once I have it in my hands, to determine what has actually been produced in response to the subpoena duces tecum, if the court would permit that?

JUDGE HUNTER: Sure. Let me just clarify all this stuff. What is discoverable is not necessarily admissible.

MR. ZELDEN: I understand, your Honor.

JUDGE HUNTER: We have very liberal discovery rules. Go ahead, sir.

MR. ZELDEN: That's it.

JUDGE HUNTER: That's it?

MR. ZELDEN: That's it.

[35] **JUDGE HUNTER:** Sonia, you got anything to say?

MS. MALLET: In regards to the 409? No, sir.

JUDGE HUNTER: Anything else you want to say?

MS. MALLET: In regards to the motion in limine –

JUDGE HUNTER: Okay. Make it quick here, as quick as you can.

MR. HAIK: Okay, Judge, I'll make it as quick as I can. We submit that with regard to accident reports, Irion versus State is controlling. Irion versus State in the First Circuit case which the DOTD Platt Veristance (ph.) the Supreme Court denied. It dealt specifically with accident reports. Neither Reickert or Palacious did. In general with regard to the 409 argument, Judge, basically there's no limit to what the DOTD could and collect under the pretense that it's doing it for the purpose of seeking federal funding. With regard to traffic counts, in it's brief, DOTD submits [36] that traffic counts are fully protected by 23:409 and we would submit to the court that that's a little too extensive. There are certainly traffic counts that are done by private entities for private business purposes that have nothing to do with DOTD. DOTD does not collect these and use these for federal funding and it doesn't come within the scope of 23:409.

With regard to the Federal Highway Administration information, Judge, this information is available to the public and we would submit that for the strict purpose of

proving notice under 9:2800, it should be admissible. With regard to the Acadian Ambulance reports.

JUDGE HUNTER: I think that's moot as far as this group is concerned. I tried to explain that to you. We'll just have to see what that is before we –

MR. HAIK: That's fine, Judge. That's fine. I'll move onto the newspaper articles. Mr. Zelden is arguing hearsay and we would request that [37] the court would defer any judgment on whether or not the matter in which it is introduced or tendered would come under an exception to the hearsay rule at the time such as present sense impression.

JUDGE HUNTER: Okay. Let me tell you how it's going to be. The newspaper articles are not come in independent of the witness.

MR. HAIK: Correct.

JUDGE HUNTER: I just hope you have the clear. Anybody that tries to slip one in by a cub reporter who maybe wasn't there and says I got a newspaper article and has it in his hot hand, it's not going to be admissible. And I'll – you always run into a mistrial if that happens.

MR. HAIK: That's not the intention, Judge.

JUDGE HUNTER: I've dealt with newspaper reporters a lot longer than you have. And I can tell you that whatever – you could caution who or whatever witness is going to be – what they know or saw [38] or heard or whatever it was, that's what they're going to do. Anything else?

MR. HAIK: The final thing is the plans, contracts, studies, and so forth, Judge, we would agree that that's very broad, the listing, and that some of that stuff would be protected under 23:409. However, the original plans we would submit have nothing to do with the purpose of seeking federal funding for highway improvement. These were discoverable. In fact, they were provided to us by DOTD in response for request for production.

JUDGE HUNTER: All right. So that's all you want is the original plan?

MR. HAIK: Yes, it is.

JUDGE HUNTER: Any problem with that?

MS. MALLET: They have them.

MR. ZELDEN: They have them.

JUDGE HUNTER: [39] Okay, then that's moot for the rest of it, right? Thank you. Somebody's going to have to prepare a judgment on this. I'm going to let you guys write down and put this out, and then I'll give you judgment. But I'm ready to hear everything. I'd like to hear the marijuana and alcohol. And then we'll let Phil get his typed out and have it for you by 5:00, right?

* * *

[67] **JUDGE HUNTER:** Absolutely. I'm ready to rule. Madam Reporter, these are going to be listed as "Reasons for Judgment." Coming before the Court today are several motions in the background for this case. And the reason we're here is, these motions arose out of an automobile accident that occurred on June 26, 1998 at the intersection of U.S. Highway 90 and Louisiana Highway 88. We've had a pretrial in this matter. At that time

several motions that was scheduled last February 7th. At that time, because of the amount of motions and other details, we fixed it for a hearing today. Most importantly, this matter is scheduled as a jury trial to begin on Tuesday, February 26th at [68] 9:00 a.m. as a first fixing. Issues before the Court are DOTD's Motion to Quash, DOTD's Motions for Protective Order, plaintiffs' – I use that plurally – Motion to Compel and a motion in limine. Defendant DOTD has filed a Motion to Quash the subpoena duces tecum in the notice of records deposition for production purposes by the plaintiffs. DOTD has requested a protective order protecting the State of Louisiana and its agencies, including the Department of Public Safety, from producing this information. The motion also stems from a request by the plaintiffs of the Iberia Parish Sheriff's office, Sheriff Sid Hebert, for records. I think it's specifically set for Troop I, a certified copy of all records and reports of, and this is coding, a certified copy of all records and reports of automobile accidents which occurred at the intersection of U.S. Highway 90 and Louisiana Highway – State Highway 88 for the period of January 1st, 1995 to May 31st, 2001. DOTD argues that the accident records are not discoverable from any source under the auspices of Louisiana Revised Statutes 32: – let's get this straight: [69] 32:398(K); 23U.S.C.402; and 23U.S.C.409; and relevant jurisprudence, such as Reickert, R-E-I-C-K-E-R-T, versus State DOTD; 6947 Section 192; and Sevario, S-E-V-A-R-I-O; 98:1302, that's a First Circuit case, and that's, I believe, 7527 Section 221. If there's any problem, Madame Reporter, with those spellings or anything else, I'll give you my home phone number and be happy to clear that up for you, or you can talk to the lawyers. That's 395 – (985)395-1900. The e-mail is drugcourt@hotmail.com. Moving ahead with the body

impending. I should say in reviewing all of this stuff over the holidays, yesterday and, of course, last weekend I'm very impressed with the dedication of the lawyers involved in this case. Certainly you did an excellent job for the State of Louisiana presenting, regardless of the outcome, presenting your side of this argument. The plaintiffs, likewise, have done a communal, but excellent job, and we appreciate that.

Going further, in analyzing Louisiana Revised Statutes [sic] 32:398, that provides, in part, that accident reports and the information [70] contained in the reports shall be confidential, shall be available only to the parties to the accident and insurers of the parties, which is subject to the Court. 32:398(K)(2) further provides that all persons and their agents are prohibited from screening accident reports if the person or his agent does not represent any of the persons involved in the particular accident, the reports for which could reasonably be expected to be available. Based on the research, it appears the 28U.S.C.409 was enacted to preclude discovery and evidence of any reports, surveys, schedules, lists, or data collected or compiled for developing any highway safety construction improvement project which may be implemented with federal aid funds. And they have this spelled out very adequately by the Court in Reickert versus State, DOTD. In going further into that opinion, it states 409 covers: number one, reports, surveys, schedules, lists for data; two, compiled with like; three, for the purpose of identifying, evaluating, planning, safety enhancement of potential of accident sights or hazardous roadway conditions; and four, [71] pursuant to Section 152. And that was further reiterated in Sevario, S-E-V-A-R-I-O, versus State. There's a dictum in these opinions that the rationale behind 409 was

enacted to foster free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. That's a quote of Reickert, and that's quoting also the Ohio case of Perkins versus Ohio Department of Transportation. I believe that was cited at 584 Northeast 794. In Reickert, the Louisiana Supreme Court held that letters from DOTD regarding post-safety increatments (ph.) were inadmissable based on 409. That's going to be Reickert. The Reickert Court reasoned that 409 was admitted to include the words, "or collected" – that's in quotes, "or collected" – to effectively eliminate the admissability of accident report, [sic] traffic counts, and other raw data collected by the Court, excluding the discovery in evidence mandated by 409 encompasses more than just simple factual information. It also includes documents held by DOTD which may reflect mental impressions, conclusions, and opinions of DOTD [72] representatives regarding the survey results. The Supreme Court, in 1999, decided Palacious, P-A-L-A-C-I-O-U-S, versus Louisiana Delta Railroad, Incorporated, 747 Section 95, and found information on a railroad crossing in that case, and in effect it was privileged from discovery. And overruling the Appellate Court Palacious, and held that a request for description of the contents of the DOTD's file on a Monnet – that's two "N's," M-O-N-N-E-T – crossings, road crossings, as well as production of federal inventories, accident districts, or plans for improvements for the crossings qualified under the categories of the, quotation marks, reports, surveys, schedules, lists, or data, end of quotation marks, that have been, quotation marks, compiled, end of quotation marks, under 23U.S.C.409. But the interesting about – am I saying it right, Palacious? The court further expounded on the evidentiary privilege of containing – and I want to read

from that regarding 23U.S.C.409. Of course, this is not to say that all documents and information in the State's possession will always be [73] privileged under 409. We conclude only that records amass [sic] pursuant to the federal safety evaluation programs described in 23U.S.C. Sections 130, 144, 152 are for the purpose of developing other highway safety improvement projects which may be federally funded are protected [sic]. The plaintiff is at liberty to investigate, examine, and present other relevant evidence so long as such evidence was not compiled or collected for purposes of federal highway improvement programs. Moreover, our ruling does not preclude the testimony of experts, eyewitnesses, or others, so long as that testimony is not based upon privileged documents or information. As this Court previously noted in Reickert, the plaintiff has not been deprived of her cause of action. She merely cannot rely on the DOTD for her discovery. That's citing Reickert at 199, not – so the language of the Palacious Court appears to put a more onerous burden on DOTD when asserting the 409 defense. The First Circuit held in Sevario versus State that the trial court aired [sic], as a matter of law, allowing the plaintiff to discover prior accident [74] reports and allowing their experts to testify regarding the substance of the accident reports and the intersection's accident history. That's, I believe, at 7527 Second at 230. In rebuttal to this argument, plaintiffs rely upon Louisiana jurisprudence in certain established, they claim, principles of interpretation. In Pitre versus State, the Third Circuit, State of Louisiana, held that the testimony reports of two witnesses were admissible in order to establish the requirements of Revised Statutes 9:2800, because the privilege provided by 28U.S.C.409 did not apply. The witnesses in those cases are names that I'm

familiar with from many years ago. Evans and Dart, Dwayne Evans and – what's Dart's first name?

MR. ZELDEN: Ollinder (ph.).

JUDGE HUNTER: Ollinder.

MR. ZELDEN: If the Court please, if I might add, that case has just been reversed by the Louisiana Supreme Court, Pitre.

JUDGE HUNTER: [75] Oh, good. Thanks for that.

MR. HAIK: I see he got his voice back.

JUDGE HUNTER: It comes and goes. The witness in Evans and Dart testified as to a similar accident that occurred in 1987 at the same location of the Pitre accident. In relation to the 1987 accident, Dr. Dart investigated the accident scene, took pictures and measurements, and reported his findings and recommendations to DOTD. I don't have an opinion. Certainly we'll get Pitre, and I will beat my law clerk with a stick tonight, because he did not get this cited. That's a joke. But he's probably one of the best law clerks we've ever had. His father is a psychiatrist in Baton Rouge that you know. He's got three doctors in his family, so we won't go there. Let me go a little bit further. Appreciate what you said. What I am going to point out to you is the Irion case, I-R-I-O-N, versus State. That's the First Circuit case that the post-Sevario opinion, and held that accident reports and parish police jury resolutions were not subject [76] to the evidentiary privileges provided in 409. Irion is the First Circuit case that at 767 Second 1220. In citing the Trial Court, the Appellate Court held that the accident reports were admissible, because these reports reflected by the

Department of Public Safety, not to the Department of Transportation. That's Irion at 1224 if you want to read it. The accident reports collected by the State in the Irion case were not collected or compiled for the purpose of obtaining federal funds ordered for safety. The fact that DOTD may have such accident reports as a raw data or information to compile other reports was of no moment in the Irion case due to the fact that the reasoning – the reason no accident could ever be admitted in any case, regardless of whether or not the State is a party, it is noted Irion was split three-to-two. However, only Judge Frank Foyle (ph.), a classmate at LSU and a notable, legal scholar in the State, believed that the admission of the accident history to be legal there. You'll see Judge Foyle's descent [sic]. It is also noted that Louisiana Supreme Court has denied writs in [77] Irion. The request for production of documents, those don't come to DOTD, but Louisiana State Police and the Sheriff of Iberia Parish, which falls under the auspices of the Louisiana Department of Public Safety and not the Louisiana Department of Transportation and Development. The accident reports compiled by the Sheriff of Iberia and Department of Public Safety were not established under the same auspices of 23U.S.C.409. This Court finds that 32:398 should be interpreted restrictively, and that 32:398(F) provides for production of such documents to any interested party upon request. Therefore, this Court has decided to rely on the recent interpretation of 23U.S.C.409, and the reasoning the Irion Court denied the defendant's Motion to Quash and Motion for Protective Order insofar as the State of Louisiana. State of Louisiana Department of Public Safety further urges that this will create an insurmountable and very difficult task between now and trial. I am not presumptuous enough to judge that, only to apply the legal

principles and establish the [78] legal right in this attempt. When you go to the Third Circuit they may have some other thing they want to do, but I think clearly they're entitled to it – to that.

Now, it gets a little dicier here when we get into the question of marijuana and alcohol. I want to be sure that you – that we're clear on this, because it's a close question. The plaintiffs in this case move this Court to strike the proffer of the Louisiana State Crime Lab reports on Tessie Duplantis, Our Lady of Lourdes Hospital, and records on Tessie Duplantis, and Acadian Ambulance medical records on Tessie Duplantis. The blood samples of Tessie Duplantis drawn by State Police registered a 0.01 blood-alcohol content. The blood sample at Our Lady of Lourdes Hospital was 0.047 blood-alcohol content. Dr. George today says that was a serum test done, and feels that there's a 15 percent discrepancy, or there about. And it was something that was a blood-alcohol content of .40. Plaintiffs argued vociferously that this testimony is irrelevant, immaterial, and prejudicial in such that it has not been shown or never will be [79] shown that Tessie Duplantis was impaired at the time of the accident. DOTD submits the evidence will demonstrate that the primary causative factor in Tessie Duplantis' failure to yield was due to Tessie Duplantis' level of impairment caused by alcohol and/or marijuana. I told you before and I'll tell you again, I make a dichotomy between alcohol and marijuana. Dr. George testified today of reason to doubt that, that a test was done in the hospital for THC or cannabinoids in her blood, and it was negative. So marijuana is an illegal drug. Alcohol is a legal drug. For a guy like me who is in the drug court business with having 250 to 350 drug addicts a week, it makes no difference to me. But in this context, it's a substance which

impairs. But in this context, I think that any testimony with regard to marijuana using a 403 analysis, the prejudice would definitely outweigh the probative value by saying, "marijuana." I differ from the plaintiffs. But I do think, in fact, that Dr. George's testimony has indicated to me an even stronger case for allowing testimony of alcohol in the bloodstream, that that should be argued [80] out before a finder of fact, Dr. Padgett, Dr. George, and any other circumstances, and these very fine affidavits. So if that makes any sense, you're going to have to prepare a judgment allowing, from my point of view, the testimony regarding alcohol. But under the 403 analysis, clearly the prejudicial value of an illegal drug uproots a probative value of this evidence. And this ruling is made under the wide discretion of the Trial Court in deciding the admissibility of evidence, and that would be Whitehead versus Kansas City Southern Railroad Company, 758 Second Section 211 at page 219.

I think the newspaper articles are not admissible, if you want someone who's going to prepare the judgment. Newspaper articles are not admissible if they are attempted to be put into evidence without a witness, and even then they may not be, but that will have to be decided at the time that they are submitted. I don't think you're entitled to that other than the original highway plans which you have, the reports from Acadian Ambulance – you've got those, right?

[81] **MR. HAIK:** I'm waiting on receipt of them.

JUDGE HUNTER: Well, you'll share. That's it. Yes?

MR. ZELDEN: One other issue. If the Court please, about the materials [sic] that was furnished by

DOTD to the Federal Highway Administration, I've requested that that be determined to be inadmissible as well.

JUDGE HUNTER: I think it's inadmissible. I mean, I don't think that they have a right to get it.

MR. BARRON: Point of clarification, your Honor, the State had requested that the subpoena be limited in the alternative to exclude post-accident data. Does your ruling include post-accident data?

JUDGE HUNTER: No. I don't limit it at all at this point. But be ready to come back if you get in the deposition and find something else. Likewise, when you take George's deposition and – Dr. George and I have a history. [82] He testified against me in virtually every alcohol blood case I had in my 20-year to 30-year career, but I've grown to respect him and – good luck. But I think clearly Dr. George is always an interesting witness. I'm sure Dr. Padgett would also be interesting, but that's for finding fact, really. My function is just to act as a referee here.

Ladies and gentlemen, that's the best I can do. If you'll get a judgment up and agree on it, then we will go from there.

MR. ZELDEN: If the Court please, it will be our intention to file a request for a writ to be conservative. We've got – we're going on the 25th or the 26th. You had mentioned the 25th the other day.

JUDGE HUNTER: Yes.

MR. ZELDEN: And you mentioned the 26th this morning.

JUDGE HUNTER: To begin picking the jury on the 26th – 25th. The trial will begin, actually, on the 26th.

[83] **MR. ZELDEN:** Okay, your Honor. Hopefully I could get it, you know – could you give us some time limit so we'll know when to file a writ?

JUDGE HUNTER: Well, I think you need some time. But the problem I've got is the question, do you intend to ask for a stay?

MR. BARRON: Absolutely, your Honor. I'll ask for a stay. That's the essence of our problem. This is the only burdensome – we're not even sure we can produce this data by the trial date. We'd have to – we have to ask for a stay.

JUDGE HUNTER: Well, you can make application.

MR. ZELDEN: We will, your Honor.

JUDGE HUNTER: You make application and go from there. I think as far as the time needed to take up writs today – it's Wednesday? How about Monday?

MR. ZELDEN: What's today? It's Wednesday. I think I [84] get them filed to you on Tuesday.

JUDGE HUNTER: It should be fairly – I know I talk too much, but it should be fairly simple issues before the Court.

MR. ZELDEN: Where are you going to be Monday?

JUDGE HUNTER: Here. I think I'm here.

PROCEEDING CONCLUDED AT 1:29 P.M.

[85] CERTIFICATE

This certification is valid only for a transcript accompanied by my original stamped seal in blue ink on this page.

I, Bettye Keyes-Kaufman, Certified Court Reporter, in an [sic] for the State of Louisiana, as the officer before whom this hearing was taken; as set forth in the foregoing 84 pages, do hereby certify that this testimony was reported by me in the voicewriting (instantaneous voice-to-text realtime translation) method, was prepared and transcribed by me, and is true and correct to the best of my ability and understanding; that I am not related to counsel, I am in no manner associated with counsel for any of the interested parties to this litigation, and I am in no way concerned with the outcome thereof.

This 13th day of February 2002, Lafayette, Louisiana.

APPENDIX E

A. 23 U.S.C. § 152 (2002). Hazard elimination program.

(a) In general.

(1) Program. Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

(2) Hazards. In carrying out paragraph (1), a State may, at its discretion –

(A) identify, through a survey, hazards to motorists, bicyclists, pedestrians, and users of highway facilities; and

(B) develop and implement projects and programs to address the hazards.

(b) The Secretary may approve as a project under this section any safety improvement project, including a project described in subsection (a).

(c) Funds authorized to carry out this section shall be available for expenditure on –

(1) any public road;

(2) any public surface transportation facility or any publicly owned bicycle or pedestrian pathway or trail; or

(3) any traffic calming measure.

(d) The Federal share payable on account of any project under this section shall be 90 percent of the cost thereof.

(e) Funds authorized to be appropriated to carry out this section shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b) except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.

(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by safety improvement projects carried out in accordance with procedures and criteria established by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for safety improvement projects.

(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the progress being made to implement safety improvement projects for hazard elimination and the effectiveness of such improvements. Each State report shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard eliminating program (including but not limited to

any projects for pavement marking). The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (a) and include recommendations for future implementation of the hazard elimination program.

(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title.

B. 23 U.S.C. § 402 (2002). Highway safety programs.

(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform guidelines promulgated by the Secretary. Such uniform guidelines shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance and bicycle safety. In addition, such uniform guidelines shall include programs

> **(1)** to reduce injuries and deaths resulting from motor vehicles being driven in excess of posted speed limits,

(2) to encourage the proper use of occupant protection devices (including the use of safety belts and child restraint systems) by occupants of motor vehicles and to increase public awareness of the benefit of motor vehicles equipped with airbags,

(3) to reduce deaths and injuries resulting from persons driving motor vehicles while impaired by alcohol or a controlled substance,

(4) to prevent accidents and reduce deaths and injuries resulting from accidents involving motor vehicles and motorcycles,

(5) to reduce injuries and deaths resulting from accidents involving school buses, and

(6) to improve law enforcement services in motor vehicle accident prevention, traffic supervision, and post-accident procedures.

The Secretary shall establish a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the States. Under such program, the States shall collect and report such data as the Secretary may require. The purposes of the program are to ensure national uniform data on such deaths and injuries and to allow the Secretary to make determinations for use in developing programs to reduce such deaths and injuries and making recommendations to Congress concerning legislation necessary to implement such programs. The program shall provide for annual reports to the Secretary on the efforts being made by the States in reducing deaths and injuries occurring at highway construction sites and the effectiveness and results of such efforts. The Secretary shall establish minimum reporting criteria for the program. Such criteria shall include, but not be limited to,

criteria on deaths and injuries resulting from police pursuits, school bus accidents, and speeding, on traffic-related deaths and injuries at highway construction sites and on the configuration of commercial motor vehicles involved in motor vehicle accidents. In addition such uniform guidelines shall include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, enforcement of light transmission standards of window glazing for passenger motor vehicles and light trucks as necessary to improve highway safety, and emergency services. Such guidelines as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations.

(b) Administration of State programs.

(1) Administrative requirements. The Secretary may not approve a State highway safety program under this section which does not –

(A) provide that the Governor of the State shall be responsible for the administration of the program through a State highway safety agency which shall have adequate powers and be suitably equipped and organized to carry

out, to the satisfaction of the Secretary, such program;

(B) authorize political subdivisions of the State to carry out local highway safety programs within their jurisdictions as a part of the State highway safety program if such local highway safety programs are approved by the Governor and are in accordance with the minimum standards established by the Secretary under this section;

(C) except as provided in paragraph (3), provide that at least 40 percent of all Federal funds apportioned under this section to the State for any fiscal year will be expended by the political subdivisions of the State, including Indian tribal governments, in carrying out local highway safety programs authorized in accordance with subparagraph (B); and

(D) provide adequate and reasonable access for the safe and convenient movement of individuals with disabilities, including those in wheelchairs, across curbs constructed or replaced on or after July 1, 1976, at all pedestrian crosswalks throughout the State.

(2) Waiver. The Secretary may waive the requirement of paragraph (1)(C), in whole or in part, for a fiscal year for any State whenever the Secretary determines that there is an insufficient number of local highway safety programs to justify the expenditure in the State of such percentage of Federal funds during the fiscal year.

(3) Use of technology for traffic enforcement. The Secretary may encourage States to use technologically advanced traffic enforcement devices (including the use of automatic speed detection

devices such as photo-radar) by law enforcement officers.

(c) Funds authorized to be appropriated to carry out this section shall be used to aid the States to conduct the highway safety programs approved in accordance with subsection (a), including development and implementation of manpower training programs, and of demonstration programs that the Secretary determines will contribute directly to the reduction of accidents, and deaths and injuries resulting therefrom. Such funds shall be subject to a deduction not to exceed 5 per centum for the necessary costs of administering the provisions of this section, and the remainder shall be apportioned among the several States. Such funds shall be apportioned 75 per centum in the ratio which the population of each State bears to the total population of all the States, as shown by the latest available Federal census, and 25 per centum in the ratio which the public road mileage in each State bears to the total public road mileage in all States. For the purposes of this subsection, a "public road" means any road under the jurisdiction of and maintained by a public authority and open to public travel. Public road mileage as used in this subsection shall be determined as of the end of the calendar year preceding the year in which the funds are apportioned and shall be certified to by the Governor of the State and subject to approval by the Secretary. The annual apportionment to each State shall not be less than one-half of 1 per centum of the total apportionment, except that the apportionment to the Secretary of the Interior shall not be less than three-fourths of 1 percent of the total apportionment and the apportionments to the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands shall not be less than one-quarter of 1 per centum of the total apportionment.

The Secretary shall not apportion any funds under this subsection to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section. For the purpose of the seventh sentence of this subsection, a highway safety program approved by the Secretary shall not include any requirement that a State implement such a program by adopting or enforcing any law, rule, or regulation based on a guideline promulgated by the Secretary under this section requiring any motorcycle operator eighteen years of age or older or passenger eighteen years of age or older to wear a safety helmet when operating or riding a motorcycle on the streets and highways of that State. Implementation of a highway safety program under this section shall not be construed to require the Secretary to require compliance with every uniform guideline, or with every element of every uniform guideline, in every State. Funds apportioned under this section to any State, that does not have a highway safety program approved by the Secretary or that is not implementing an approved program, shall be reduced by amounts equal to not less than 50 per centum of the amounts that would otherwise be apportioned to the State under this section, until such time as the Secretary approves such program or determines that the State is implementing an approved program, as appropriate. The Secretary shall consider the gravity of the State's failure to have or implement an approved program in determining the amount of the reduction. The Secretary shall promptly apportion to the State the funds withheld from its apportionment if he approves the State's highway safety program or determines that the State has begun implementing an approved program, as appropriate, prior to the end of the fiscal year for which the funds were withheld. If the Secretary determines that the State did not correct its

failure within such period, the Secretary shall reapportion the withheld funds to the other States in accordance with the formula specified in this subsection not later than 30 days after such determination.

(d) All provisions of chapter 1 of this title [23 USCS §§ 101 et seq.] that are applicable to National Highway System highway funds other than provisions relating to the apportionment formula and provisions limiting the expenditure of such funds to the Federal-aid systems, shall apply to the highway safety funds authorized to be appropriated to carry out this section, except as determined by the Secretary to be inconsistent with this section, and except that the aggregate of all expenditures made during any fiscal year by a State and its political subdivisions (exclusive of Federal funds) for carrying out the State highway safety program (other than planning and administration) shall be available for the purpose of crediting such State during such fiscal year for the non-Federal share of the cost of any project under this section (other than one for planning or administration) without regard to whether such expenditures were actually made in connection with such project and except that, in the case of a local highway safety program carried out by an Indian tribe, if the Secretary is satisfied that an Indian tribe does not have sufficient funds available to meet the non-Federal share of the cost of such program, he may increase the Federal share of the cost thereof payable under this Act to the extent necessary. In applying such provisions of chapter 1 [23 USCS §§ 101 et seq.] in carrying out this section the term "State transportation department" as used in such provisions shall mean the Governor of a State for the purposes of this section.

(e) Uniform guidelines promulgated by the Secretary to carry out this section shall be developed in cooperation with the States, their political subdivisions, appropriate Federal departments and agencies, and such other public and private organizations as the Secretary deems appropriate.

(f) The Secretary may make arrangements with other Federal departments and agencies for assistance in the preparation of uniform guidelines for the highway safety programs contemplated by subsection (a) and in the administration of such programs. Such departments and agencies are directed to cooperate in such preparation and administration, on a reimbursable basis.

(g) Nothing in this section authorizes the appropriation or expenditure of funds for (1) highway construction, maintenance, or design (other than design of safety features of highways to be incorporated into guidelines) or (2) any purpose for which funds are authorized by section 403 of this title.

(h) [Repealed]

(i) Application in Indian country.

(1) Use of terms. For the purpose of application of this section in Indian country, the terms "State" and "Governor of a State" include the Secretary of the Interior and the term "political subdivision of a State" includes an Indian tribe.

(2) Expenditures for local highway programs. Notwithstanding subsection (b)(1)(C), 95 percent of the funds apportioned to the Secretary of the Interior under this section shall be expended by Indian tribes to carry out highway safety programs within their jurisdictions.

(3) Access for individuals with disabilities. The requirements of subsection (b)(1)(D) shall be applicable to Indian tribes, except to those tribes with respect to which the Secretary determines that application of such provisions would not be practicable.

(4) Indian country defined. In this subsection, the term "Indian country" means –

(A) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent and including rights-of-way running through the reservation;

(B) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof and whether within or without the limits of a State; and

(C) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments.

(j) Rulemaking proceeding. The Secretary may periodically conduct a rulemaking process to identify highway safety programs that are highly effective in reducing motor vehicle crashes, injuries, and deaths. Any such rulemaking shall take into account the major role of the States in implementing such programs. When a rule promulgated in accordance with this section takes effect, States shall consider these highly effective programs when developing their highway safety programs.

(k) (1) Subject to the provisions of this subsection, the Secretary shall make a grant to any State

which includes, as part of its highway safety program under section 402 of this title [this section], the use of a comprehensive computerized safety recordkeeping system designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways. Any such grant may only be used by such State to establish and maintain a comprehensive computerized traffic safety recordkeeping system or to obtain and operate components to support highway safety priority programs identified by the Secretary under this section. Notwithstanding any other provision of law, if a report, list, schedule, or survey is prepared by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

(2) No State may receive a grant under this subsection in more than two fiscal years.

(3) The amount of the grant to any State under this subsection for the first fiscal year such State is eligible for a grant under this subsection shall equal 10 per centum of the amount apportioned to such State for fiscal year 1985 under this section. The amount of a grant to any State under this subsection for the second fiscal year such State is eligible for a grant under this subsection shall equal 10 per centum of the amount apportioned to such State for fiscal year 1986 under this section.

(4) A State is eligible for a grant under this subsection if –

(A) it certifies to the Secretary that it has in operation a computerized traffic safety recordkeeping system and identifies proposed means of upgrading the system acceptable to the Secretary; or

(B) it provides to the Secretary a plan acceptable to the Secretary for establishing and maintaining a computerized traffic safety recordkeeping system.

(5) The Secretary, after making the deduction authorized by the second sentence of subsection (c) of this section for fiscal years 1985 and 1986, shall set aside 10 per centum of the remaining funds authorized to be appropriated to carry out this section for the purpose of making grants under this subsection. Funds set aside under this subsection shall remain available for the fiscal year authorized and for the succeeding fiscal year and any amounts remaining unexpended at the end of such period shall be apportioned in accordance with the provisions of subsection (c) of this section.

C. 23 U.S.C. § 409 (2002). Discovery and admission as evidence of certain reports and surveys.

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing

Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(2)

Supreme Court, U.S.
FILED

DEC 9 2002

OFFICE OF THE CLERK

No. 02-414

In The Supreme Court of the United States

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Petitioner,

v.

DAVID M. CHAMPAGNE, SR., JIMMY GUILLORY, LINDA GUILLORY, CHRIS GREEN as co-tutor of the minor child, SETH LEBLANC, DEBORAH ELLENDER as co-tutor of the minor child, SETH LEBLANC, MARIA WAGUESPACK on behalf of the minor child, CYNTHIA WAGUESPACK, SILENCE DUPLANTIS, and DURPHY BOURQUE,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Sixteenth Judicial District Court, Iberia Parish

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS CORNE
Counsel of Record
Post Office Box 5146
Lafayette, Louisiana
70502-5146
(337) 264-1160

MARK G. ARTALL
111 East Main Street
Lafayette, Louisiana 70501
(337) 233-1777

MORRIS M. HAIK, JR.
110 West Washington Street
New Iberia, Louisiana 70560
(337) 560-4357

Attorneys For Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statutory Provisions	1
Counter Statement of the Case	1
Reasons for Denying the Writ of Certiorari	5
I. There is no conflict presented	5
II. The Clear Terms of Section 409 show that the subpoenaed accident reports are discoverable and admissible	7
III. Compilation or Collection Requirement of 23 U.S.C. § 409	8
IV. Opposition to Collateral Argument	9
V. 23 U.S.C. § 402 Does Not Apply	10
Conclusion	11
Appendix	
A. Statutory provisions	App. 1

TABLE OF AUTHORITIES

Page

CASES

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 7

Guillen v. Piece County, 31 P.3d (Wash. 9/13/01), *cert. granted, Pierce County v. Guillen*, No. 01-1229, ___ U.S. ___, 2002 U.S. LEXIS 3044 (4/29/02) 5

Irion v. State ex rel. Department of Transportation and Development, 98-CA-2616 (La. App. 1st Cir. 5/12/00), 760 So.2d 1220, *writ denied*, 773 So.2d 727 (La. 11/13/00) 5, 9

Lloyd v. Pennie, 50 F. 4 Northern District of California (1892) 9

O'Toole v. Ohio German Fire Ins. Co., 159 Mich. 187 (12/10/09) 9

Palacios v. Louisiana and Delta R.R. Inc., 98-CC-2932, 740 So.2d 95 (La. 7/2/99) 5

Reichert v. State, DOTD, 96-C-1419 c/w 96-C-1460, 694 So.2d 193 (La. 5/20/97) 5

Sevario v. State ex rel. Dept. of Transp. and Dev., 98-1302 Page 6 (La. App. 1st Cir. 11/10/99), 752 So.2d 221, *writ denied*, 1999-3457, 759 So.2d 760 (La. 4/7/00) 9

State of Louisiana, Through the Department of Transportation and Development v. David M. Champagne, et al. 91,413-D (La. 16th J.D.C., Iberia Parish 2/19/02), *writ denied*, CW-02-00230 (La. App. 3 Cir. 3/26/02), *writ denied*, 2002-CC-1115, 817 So.2d 1161 (La. 6/14/02) 5

Tutson v. Holland, 50 F.2d 338 (5/4/31) 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090 (1974) 9

Wolfe v. United States, 291 U.S. 7 (1934) 9

STATUTORY PROVISIONS

A. 23 U.S.C. § 152. Hazard Elimination Program (See DOTD's Petition for Writ of Certiorari, Appendix E, App. 50, for text.)

B. 23 U.S.C. § 402. Highway Safety Programs (See DOTD's Petition for Writ of Certiorari, Appendix E, App. 52, for text.)

C. 23 U.S.C. § 409. Discovery and admission as evidence of certain reports and surveys (See DOTD's Petition for Writ of Certiorari, Appendix E, App. 63, for text.)

D. LSA-R.S. 9:2800. Limitation of liability for public bodies (See Appendix A for text.)

E. LSA-R.S. 32:397. Commissioner to furnish forms and receive accident reports (See Appendix A for text.)

COUNTER STATEMENT OF THE CASE

On June 26, 1998, Ms. Tessie Duplantis was traveling in a southerly direction on Louisiana Highway 88 on her way to a birthday party. There were six passengers in her vehicle, namely, Rhoda LeBlanc, age 21; Joshua Bourque, age 19; Chastity Guillory, age 20; Destanie Champagne, age 3; David Champagne, Jr., age 1 and Cynthia Waguespack, age 17.

Louisiana Highway 88 intersects with U.S. Highway 90, a two-way, four-lane divided highway. Ms. Duplantis crossed the westbound lane of U.S. Highway 90 without incident and proceeded into the area between the eastbound and westbound lanes of U.S. Highway 90. At the

intersection where this accident occurred, the two lanes of Highway 90 divide and there are several hundred yards between the eastbound and westbound lanes of travel of Highway 90. Louisiana Highway 88 becomes a two-way, four-lane roadway between the eastbound and westbound lanes of travel of U.S. Highway 90. It reverts to a two-way, two-lane roadway on either side of U.S. Highway 90.

After crossing the westbound lane of U.S. Highway 90, Ms. Duplantis entered the left hand lane of travel of Louisiana Highway 88. When she reached the eastbound lane of U.S. Highway 90, a Saturn automobile being driven by Mr. Donald Lemaire was stopped at a posted stop sign in the right hand lane of travel of Louisiana Highway 88. Mr. Lemaire testified in his deposition that Ms. Duplantis stopped at the posted stop sign on Louisiana Highway 88 and then attempted to cross the eastbound lane of U.S. Highway 90 when her vehicle was struck on the right side by a motorhome being driven by Mr. Wayne Conaway. The impact of the collision killed Rhoda LeBlanc, Joshua Bourque, Chastity Guillory, Destanie Champagne and David Champagne, Jr. Ms. Duplantis and the remaining passenger, Cynthia Waguespack, sustained serious injuries. The Louisiana State Police investigated the accident and prepared an accident report. Ms. Duplantis received a traffic citation for "failure to yield from a stopped position" and pled "guilty/no contest".

The sole surviving passenger and the survivors of the deceased passengers sued Mr. Wayne Conaway and his insurer, State Farm Mutual Automobile Insurance Company, the uninsured motorist insurers of two of the passengers in Ms. Duplantis' vehicle and the State of Louisiana through the Department of Transportation and

Development (DOTD). DOTD is the only remaining defendant in the case.

Pursuant to Louisiana Revised Statute 9:2800, the plaintiffs are required to prove that DOTD had actual or constructive notice of a vice or defect in the intersection in question and further, that it had a reasonable opportunity to remedy the defect but failed to do so. In order to meet that burden of proof, the Plaintiffs sought copies of accident reports from Louisiana State Police Troop I and the Iberia Parish Sheriff's Department for all accidents which occurred at the intersection of Louisiana Highway 88 and U.S. Highway 90 for the time period beginning January 1, 1995 through May 31, 2001. The Plaintiffs therefore issued subpoenas duces tecum to these entities for the accident reports.

DOTD moved to quash the subpoenas based upon 23 U.S.C. § 402K and § 409, alleging that a purpose of the requested accident reports was to gather information to evaluate, prioritize and obtain federal funding for Highway Safety Enhancement. (Pet. App. 3.)

The Louisiana State Police had been preparing accident reports for many years prior to the accident in question pursuant to Louisiana Revised Statute 32:397. LSA-R.S. 32:397 was originally enacted in 1962. This statute requires that the Louisiana Department of Public Safety (DPSC) prepare accident reports which contain information such as the names of the persons involved, the vehicles involved and the names of the liability carriers and policy numbers. It is fairly clear that the purpose for preparing these accident reports by DPSC has been to facilitate resolution of liability issues which may arise as a result of an automobile accident. The State of Louisiana

bears the costs associated with the preparation of these accident reports.

Mr. Charles Miller, Jr., a Statistician and Traffic Records Coordinator with the Louisiana Highway Safety Commission (LHSC) testified at the hearing on DOTD's Motion to Quash. (Pet. App. 24.) He testified that the Louisiana State Police Traffic Records Bureau is the curator of all original state police traffic records. The reports are received from the various Troops throughout the state and they are stored and potentially microfilmed at the Louisiana State Police Traffic Records Bureau. (Pet. App. 25.) The cost of storing these accident reports is also paid for by the State of Louisiana. (Pet. App. 33.) The LHSC receives copies of these accident reports from the Louisiana State Police and all other police agencies in Louisiana. (Pet. App. 26.) Copies of these accident reports are then forwarded to DOTD. DOTD then "spots" the location of the accidents and returns the accident reports to LHSC. (Pet. App. 27.) LHSC then enters data from the accident reports into a data base and the paper copies of the accident reports are disposed of. A copy of this data base is forwarded to DOTD several times a year. (Pet. App. 26.) The cost of the database prepared by LHSC is paid for with federal funds.

The trial court denied DOTD's Motion to Quash by Judgment dated February 19, 2002. (Pet. App. 1.) DOTD filed an Application for Supervisory Writ with the Louisiana Third Circuit Court of Appeal. That Application was denied on March 26, 2002. On June 14, 2002, the Supreme Court of Louisiana denied DOTD's Application for Supervisory and/or Remedial Writs.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. There Is No Conflict Presented

There is no conflict between state courts of last resort regarding the applicability of 23 U.S.C. § 409 to accident reports. This court recently granted certiorari to review a decision of the Washington State Supreme Court in the matter of *Guillen v. Piece County*, 31 P.3d (Wash. 9/13/01), *cert. granted, Pierce County v. Guillen*, No. 01-1229, ___ U.S. ___, 2002 U.S. LEXIS 3044 (4/29/02). The final conclusion made by the Guillen court is as follows:

> "We conclude that Congress' 1995 Amendment to Section 409 was unconstitutional and is thus unenforceable."

The issue of the constitutionality of the 1995 amendment to Section 409 has not been raised by either party in the matter of *State of Louisiana, Through the Department of Transportation and Development v. David M. Champagne, et al.* 91,413-D (La. 16th J.D.C., Iberia Parish 2/19/02), *writ denied,* (W-02-00230 (La. App. 3 Cir. 3/26/02), *writ denied*, 2002-CC-1115, 817 So.2d 1161 (La. 6/14/02). In denying DOTD's Motion to Quash, the trial court relied upon the reasoning in *Irion v. State ex rel. Department of Transportation and Development*, 98-CA-2616 (La. App. 1st Cir. 5/12/00), 760 So.2d 1220, *writ denied*, 773 So.2d 727 (La 11/13/00). Irion conducted an extensive analysis of 23 U.S.C. § 409 and the Louisiana Supreme Court's rulings in *Reichert v. State*, DOTD, 96-C-1419 c/w 96-C-1460, 694 So.2d 193 (La. 5/20/97) and *Palacios v. Louisiana and Delta R.R. Inc.*, 98-CC-2932, 740 So.2d 95 (La. 7/2/99). Following this analysis, the Irion court made a factual determination that the accident

reports at issue were not collected or compiled by the state for the purpose of obtaining federal funds or to enforce safety. The court stated:

> "Historically, accident reports have been collected by the Department of Public Safety for many other purposes. Collection and compilation of such reports have far outdated the enactment of 23 U.S.C. § 409, although the Department of Transportation and Development may have used such accident reports as raw data or information to compile other reports. That fact, in and of itself, does not make the underlying facts inadmissable simply because they are later recorded by the Department of Transportation and Development. Furthermore, if the court were to adopt the interpretation which the State proposes, then no accident report could ever be admitted in any case, regardless of whether or not the State is a party. Clearly, this is not the intent of the statute. The federal statute must be construed restrictively to prohibit only the information that is expressly stated therein. . . . The documents at issue in this case is not the type of evidence that § 409 is designed to protect from discovery and admission into evidence."

The analysis of 23 U.S.C. § 409 by Louisiana courts has clearly focused on a factual determination as to whether or not the manner in which the State of Louisiana utilizes accident reports will subject those accident reports to the evidentiary privilege established by 23 U.S.C. § 409. This type of analysis does not conflict with the constitutional issues addressed in Guillen. Additionally, both the Guillen court and the Louisiana Supreme Court have ultimately concluded that accident reports are not subject

to the privilege created by 23 U.S.C. § 409. DOTD's allegations of conflict between state courts of last resort are based solely upon dicta in Guillen which addressed which department of the government possessed the reports. There is therefore no conflict between state courts of last resort as required by Rule 10(b) which would warrant review under Writ of Certiorari by this Court.

II. The Clear Terms of Section 409 show that the subpoenaed accident reports are discoverable and admissible

In interpreting a statute, this Court begins by determining whether its meaning is clear upon its face. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

Section 409 states that:

(1) Reports (in this case all police accident reports over a 5 year period at the intersection of Louisiana Highway 88 and U.S. Highway 90);

(2) Compiled or collected;

(3) For the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites or hazardous roadway conditions;

(4) Pursuant to 23 U.S.C. Section 152;

(5) Are not subject to discovery or admitted into evidence;

(6) In any action for damages;

(7) Arising from any occurrence at a location mentioned or addressed in such report (police report).

Respondents argue that the only police report which would be protected from discovery would be the accident report which mentions or addresses the occurrence made subject of the present action for damages. The only police report which meets all of these qualifications is the accident report which recorded the facts of the accident made subject of this litigation. It is argued that all other accident reports concerning this intersection which do not address this accident are not protected under the clear and unambiguous terms of Section 409.

III. Compilation or Collection Requirement of 23 U.S.C. § 409

23 U.S.C. § 409 protects data compilation. The actual police report is not the data "compilation". The compilation for purposes of federal funding is the database which DOTD puts together using nothing more than the location of accidents, which is but one bit of information contained within the police accident report. The accident reports are not prepared for the express purpose of highway safety evaluation or to assist DOTD in highway safety evaluation. Police accident reports are prepared for many reasons. Primarily, the preparation of accident reports is meant to assist the parties involved in determining the cause of an accident, the conditions existing at the time of the accident, identification of the parties and vehicles and information regarding insurance coverage on the vehicles involved. (See LSA-R.S. 32:397 & 32:398). The DOTD may collect and compile information for the purpose of highway

safety evaluation and in doing so derives one bit of information from the police accident reports; the locations of accidents.

The Louisiana State Police simply prepares accident reports. They do not compile or collect accident reports as contemplated by 23 U.S.C. § 409. These reports are in fact collected by the LHSC for the purposes specified in 23 U.S.C. § 409. The LHSC then forwards these collected reports to DOTD. DOTD then compiles information from the collected reports such as the location of accidents and returns the reports to the LHSC. DOTD's actions are also performed for the purposes specified in 23 U.S.C. § 409. Under a plain reading of 23 U.S.C. § 409, in order to be protected, accident reports must be "collected" for the purposes set forth in 23 U.S.C. § 409. Accident reports which are in the hands of the Louisiana State Police are not "collected" as contemplated by 23 U.S.C. § 409 and are therefore not subject to the evidentiary privilege.

IV. Opposition to Collateral Argument

The ruling of the Louisiana courts in this case do not judicially amend or partially nullify Section 409. To the contrary, the present Louisiana ruling properly restricts the application of Section 409, rather than allowing an overly expansive interpretation. It is well settled that a statute such as Section 409, which works to exclude otherwise relevant and admissible evidence must be strictly construed. The application of the statute creates an evidentiary privilege which necessarily is in derogation of the search for the truth. *United States v. Nixon*, 418 U.S. 683, 710 n. 18, S.Ct. 3090, 3108 n. 18 (1974). Consequently, the statute must be construed restrictively to

prohibit only the information that is expressly described therein. *Lloyd v. Pennie*, 50 F. 4 Northern District of California (1892); *Tutson v. Holland*, 50 F.2d 338 (5/4/31); *O'Toole v. Ohio German Fire Ins. Co.*, 159 Mich. 187 (12/10/09); *Wolfe v. United States*, 291 U.S. 7 (1934); *Irion v. State ex rel. Dept. of Transp. and Dev.*, 98-2616 (La. App. 1st Cir. 5/12/00), 760 So.2d 1220, *writ denied*, 2000-2365, 773 So.2d 727 (La. 11/13/00); *Sevario v. State ex rel. Dept. of Transp. and Dev.*, 98-1302 Page 6 (La. App. 1st Cir. 11/10/99), 752 So.2d 221, *writ denied*, 1999-3457, 759 So.2d 760 (La. 4/7/00).

The number of road hazard cases defended by the State of Louisiana and the size of the state's risk management budget attributable to such litigation is not relevant. For if so it would be just as relevant to assert that the particular highway in question, which supports a very large volume of high speed traffic, is commonly referred to as "Blood Alley", due to the enormous number of traffic accidents, critical injuries and deaths that have occurred on this dangerous roadway. It would be just as relevant to point out that this main east-west thoroughfare has an internet website devoted to it, due to its historically dangerous reputation. Volumes of information regarding the ongoing efforts of the motoring public and the residents of south Louisiana to convert this highway to a closed access interstate for safety as well as economic purposes, can be found online at http://149.com.

V. 23 U.S.C. § 402 Does Not Apply

23 U.S.C. § 402 addresses admissibility or use of reports in suits for damages in k(1) as follows:

> "if a report, list, schedule or survey is prepared by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule or survey."

A clear reading of the statute shows that a police report of an accident may be prevented from use at a trial on that matter but all other accident reports would not be prohibited. In the case at hand, the plaintiff's subpoenaed all police reports made as a result of accidents at the intersection of U.S. Highway 90 and Louisiana Highway 88. Section 402 would prohibit the use of the accident report of the matter made subject of plaintiff's suit but no other. All other police reports would be discoverable and usable at trial.

CONCLUSION

DOTD's position in this matter would render all accident reports and all information contained therein nondiscoverable and inadmissible in any action for damages. This would necessarily prohibit the introduction into evidence of items such as the results of blood alcohol tests, citations received by the parties, DWI convictions, photographs of the accident scene, statements of the parties, etc. This would clearly lead to absurd results. There is no error in the decisions of the Louisiana courts in their interpretation of 23 U.S.C. § 409. There is also no conflict between the decision of the Louisiana Supreme Court and that of the Washington Supreme Court. Respondents respectfully

submit that certiorari is not warranted in this case. DOTD's petition should be denied.

Respectfully submitted,

LOUIS CORNE (4407)
Post Office Box 5146
Lafayette, Louisiana 70502-5146
(337)264-1160
Attorney for Cynthia Waguespack and Christopher Green

MORRIS M. HAIK, JR. (17578)
110 West Washington Street
New Iberia, Louisiana 70560
(337) 560-4357
Attorney for Durphy Bourque and Silence Duplantis

MARK G. ARTALL (21227)
111 East Main Street
Lafayette, Louisiana 70501
(337) 233-1777 (Phone)
(337) 232-1008 (Fax)
Attorney for David M. Champagne, Sr., Jimmy Guillory, Linda Guillory and Deborah Ellender as co-tutor of the minor child, Seth LeBlanc

APPENDIX

LSA-R.S. 32:397. Commissioner to furnish forms and receive accident reports

A. The commissioner shall prepare, and may supply to police and sheriff offices and other suitable agencies, forms for accident reports calling for sufficiently detailed information to disclose, with reference to a highway accident, the cause, the conditions then existing, the persons and vehicles involved, the names of the liability carriers and policy numbers for the vehicles, and the name, address, and telephone number of the insurance agents who procured the liability policies providing coverage for the vehicles.

B. The commissioner shall receive accident reports required to be made by law and shall tabulate and analyze such reports and publish, annually or at more frequent intervals, statistical information based thereon as to the number, cause, and location of highway accidents.

LSA-R.S. 9:2800. Limitation of liability for public bodies

A. A public entity is responsible under Civil Code Article 2317 for damages caused by the condition of buildings within its care and custody.

B. Except as provided for in Subsection A of this Section, no person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular

vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.

C. Constructive notice shall mean the existence of facts which infer actual knowledge.

D. A violation of the rules and regulations promulgated by a public entity is not negligence per se.

E. "Public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions. Public entity also includes housing authorities, as defined in R.S. 40:382(1), and their commissioners and other officers and employees.

(3)

No. 02-414

Supreme Court, U.S.
FILED
DEC 23 2002
CLERK

In The
Supreme Court of the United States

STATE OF LOUISIANA,
THROUGH THE DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT,

Petitioner,

v.

DAVID M. CHAMPAGNE, SR., JIMMY GUILLORY, LINDA GUILLORY, CHRIS GREEN as co-tutor of the minor child, SETH LeBLANC, DEBORAH ELLENDER as co-tutor of the minor child, SETH LeBLANC, MARIA WAGUESPACK on behalf of the minor child, CYNTHIA WAGUESPACK, SILENCE DUPLANTIS, and DURPHY BOURQUE,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Sixteenth Judicial District Court, Iberia Parish

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD P. IEYOUB
Attorney General
State of Louisiana

LAWRENCE A. DURANT
General Counsel
Department of Transportation and Development
State of Louisiana

WILLIAM M. HUDSON, III
PATRICK B. MCINTIRE
Counsel of Record
LAWRENCE E. MARINO
OATS & HUDSON
A Partnership of Professional Corporations
Gordon Square, Suite 400
100 East Vermilion Street
Lafayette, LA 70501
Telephone: (337) 233-1100

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

14pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
I. *Certiorari* is warranted and appropriate	1
II. Section 409 applies to accident reports	2
A. Section 409 applies to accident reports because highway safety evaluation is *one* purpose for these materials	2
B. Accident reports are "compiled or collected" within the meaning of Section 409	4
C. Plaintiffs do not need to introduce accident reports regarding other accidents in order to establish DOTD's notice of a defect	5
D. The literal terms of Section 409 should not apply to the accident report for the accident at issue in a particular case	7
E. Section 402(k) also protects accident reports	9
Conclusion	10

TABLE OF AUTHORITIES

Page

CASES

Crooks v. Harrelson, 282 U.S. 55 (1930) 9

Coniker v. State of New York, 695 N.Y.S.2d 492 (N.Y.Ct.Cl. 1999) 4

Duffy v. State ex rel. Dept. of Transp. & Dev., 95-1398 (La. App. 1 Cir. 2/23/96), 668 So.2d 1349 7

Fraley v. State of Louisiana, through its DOTD, 2001-CC-2467 (La. 9/7/01), 795 So.2d 1217 1

Guillen v. Pierce County, 31 P.3d 628 (Wash. 9/13/01), *cert. granted, Pierce County v. Guillen*, No. 01-1229, __ U.S. __, 2002 U.S. LEXIS 3044 (4/29/02) 1, 2

Irion v. State ex rel. Dept. of Transp. and Dev., 98-CA-2616 (La. App. 1 Cir. 5/12/00), 760 So.2d 1220, *writ denied*, 773 So.2d 727 (La. 11/13/00) 1

Lusby v. Union Pacific R.R. Co., 4 F.3d 639 (8th Cir. 1993) 3

Mackie v. Grand Trunk Western R.R. Co., 544 N.W.2d 709 (Mich. App. 1996) 3

Palacios v. Louisiana and Delta R.R. Inc., 98-CC-2932 (La. 7/2/99), 740 So.2d 95 4

Pickens v. St. Tammany Parish, 323 So.2d 430 (La. 12/8/75) 6

Powers v. CSX Transp., Inc., 177 F.Supp.2d 1276 (S.D.Ala. 2001) 3

Reichert v. State, DOTD, 96-C-1419 c/w 96-C-1460 (La. 5/20/97), 694 So.2d 193 4

Rick v. State of La., Dept. of Transp. and Dev., 93-C-1776 (La. 1/4/94), 630 So.2d 1271 4

TABLE OF AUTHORITIES – Continued

Page

Rivers v. Hill, 2001-CC-2496 (10/10/01), 799 So.2d 486 1

Robertson v. Union Pacific R.R. Co., 954 F.2d 1433 (8th Cir. 1992) 3

Seaton v. Johnson, 898 S.W.2d 232 (Tenn. App. 1995) 3

Tardy v. Norfolk Southern Corp., 659 N.E.2d 817 (Ohio App. 1995) 4

U.S. v. Kirby, 74 U.S. 482 (1868) 9

Whatley v. City of Winnfield, 802 So.2d 983 (La. App. 2 Cir. 12/5/01), *writ denied*, 811 So.3d 939 (La. 3/22/02) 6

Wiedeman v. Dixie Electric Membership Corp., 627 So.2d 170 (La. 1993), *cert. denied*, *Louisiana Dept. of Transp. and Dev. v. Wiedeman*, 511 U.S. 1127 (1994) 3, 4, 5, 9

STATUTES, STATUTORY MATERIALS, AND REGULATIONS

23 U.S.C. § 152 1

23 U.S.C. § 402 ..... 9, 10

23 U.S.C. § 409 ..... *passim*

H.R. Rept. No. 104-246 (1995) 3

LA. REV. STAT. ANN. § 9:2800 ..... 5, 7

LA. REV. STAT. ANN. § 38:397 3

LA. REV. STAT. ANN. § 38:398 3

ARGUMENT

I. *Certiorari* is warranted and appropriate.

Respondents argue that there is no conflict between the Louisiana and Washington Supreme Courts regarding the applicability of Section 409 to accident reports. They reason that the Louisiana decisions depend on factual determinations regarding the use of these materials, while the Washington decision on the application of Section 409 to accident reports in the hands of various agencies is *dicta* because the case was decided on the unconstitutionality of the 1995 amendment. Opp. 5-6.

The Louisiana Supreme Court did not offer any detailed explanation of its holdings in *Fraley v. State of Louisiana, through its DOTD*, 2001-CC-2467 (La. 9/7/01), 795 So.2d 1217; or *Rivers v. Hill*, 2001-CC-2496 (La. 10/10/01), 799 So.2d 486. However, these decisions certainly reflect the conclusion that documents in the possession of the police would not be protected by Section 409. Respondents rely upon a quote from *Irion v. State ex rel. Dept. of Transp. and Dev.*, 98-CA-2616 (La. App. 1 Cir. 5/12/00), 760 So.2d 1220, *writ denied*, 773 So.2d 727 (La. 11/13/00). Opp. 6. The quoted language emphasizes the fact that accident reports have historically been collected by the Department of Public Safety and Corrections (DPSC) for other purposes besides Section 152, and reflects the same reasoning as the concurring opinion in *Guillen v. Pierce County*, 31 P.3d 628 (Wash. 9/13/01), *cert. granted, Pierce County v. Guillen*, No. 01-1229, ___ U.S. ___, 2002 U.S. LEXIS 3044 (4/29/02). In that concurring opinion, Justice Madsen reasoned that litigants should be able to discover and rely upon accident reports from a law enforcement agency even if those same reports were not discoverable from the highway department. Justice

Madsen criticized the majority for dismissing this distinction as inconsequential. *Id.* at 658.

The majority in *Guillen*, however, did not dismiss Justice Madsen's (or Louisiana's) distinction as inconsequential. Rather, this distinction was rejected as "unsound in principle and unworkable in practice." *Id.* at 646. Based upon the affidavits in the record, the majority in *Guillen* found that the accident reports would have been protected by Section 409. *Id.* at 645. It was that finding which forced the majority to address the constitutional issues. The rejection of Justice Madsen's (and Louisiana's) distinction was not *dicta*.

Respondents dispute the relevance of the large number of road hazard cases brought against the State of Louisiana, and the large size of the State's risk management budget for these cases. Opp. 10. These matters are relevant to demonstrate the significance of the issues in this case, which is part of DOTD's burden under Supreme Court Rule 10(b) in establishing the propriety of *certiorari*. This is not a rare issue, or one that would affect few cases or cases involving only small sums; rather, it is an important issue that merits granting *certiorari*.

II. Section 409 applies to accident reports.

A. Section 409 applies to accident reports because highway safety evaluation is *one* purpose for these materials.

Respondents argue that Section 409 should be interpreted as not applying to accident reports because these documents are prepared primarily to provide information

for the parties to an accident. Opp. 8-9, *citing* LA. REV. STAT. ANN. 32:397, LA. REV. STAT. ANN. 32:398.

This argument misses the point. It is undisputed that assisting the parties is a purpose for accident reports. Regardless, since the mid-1970s, highway safety evaluation has *also* been a purpose for accident reports, and in fact a primary purpose. *See* DOTD's Petition, pp. 11-15; Exhibits 1-9.

Numerous courts have recognized that Section 409 applies to materials that were not created *solely* for safety evaluation purposes. *Lusby v. Union Pacific R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993); *Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 n.3 (8th Cir. 1992); *Powers v. CSX Transp., Inc.*, 177 F.Supp.2d 1276, 1278 (S.D.Ala. 2001); *Mackie v. Grand Trunk Western R.R. Co.*, 544 N.W.2d 709, 711 (Mich. App. 1996); *Seaton v. Johnson*, 898 S.W.2d 232, 237 (Tenn. App. 1995). Section 409 requires only that materials be compiled or collected *for* the purpose of highway safety, not "*exclusively and only*" for this purpose. Had Congress meant to restrict the statute in this manner, it could have so provided.

Before 1995, Section 409 applied only to materials "compiled" for highway safety evaluation purposes. In *Wiedeman v. Dixie Electric Membership Corp.*, the Louisiana Supreme Court refused to apply the statute to accident reports, reasoning that they were "collected" for highway safety purposes, but were not themselves "compiled" for such purposes. 627 So.2d 170, 173 (La. 1993), *cert. denied, Louisiana Dept. of Transp. and Dev. v. Wiedeman*, 511 U.S. 1127 (1994). Congress then amended Section 409 to apply to materials "compiled *or collected*" for highway safety purposes. H.R. Rep. No. 104-246, § 328,

at 59 (1995) (emphasis added). The purpose of this amendment has been universally recognized as being to reverse *Wiedeman* and similar cases. *Reichert v. State, DOTD*, 96-C-1419 (La. 5/20/97), 694 So.2d 193, 198; *Palacios v. Louisiana and Delta R.R. Inc.*, 98-CC-2932 (La. 7/2/99), 740 So.2d 95, 97; *Coniker v. State of New York*, 695 N.Y.S.2d 492, 495 (N.Y.Ct.Cl. 1999). Congress was undoubtedly aware that accident reports "collected" for highway safety purposes *also* have other purposes, but nevertheless clearly intended to overturn the result in *Wiedeman*.

Traffic counts serve as a tool to analyze problems with congestion and to plan for future development; they are not collected solely for safety enhancement. If Section 409 does not apply to accident reports because they serve multiple purposes, then the traffic counts and other raw data that were also at issue in *Wiedeman* would be similarly unprotected. *Id.*, 627 So.2d at 173. *See also Rick v. State of La., Dept. of Transp. and Dev.*, 93-C-1776 (La. 1/4/94), 630 So.2d 1271, 1276-77; *Tardy v. Norfolk Southern Corp.*, 659 N.E.2d 817, 820-21 (Ohio App. 1995). The result that Congress clearly intended from the 1995 amendment would be completely undone.

Thus, the fact that accident reports are created for other purposes *in addition* to highway safety evaluation does not exclude them from Section 409.

B. Accident reports are "compiled or collected" within the meaning of Section 409.

Respondents argue that Section 409 should be interpreted as not applying to accident reports because the police neither collect nor compile accident reports, but

simply "prepare" them; while Louisiana Highway Safety Commission (LHSC) of the DPSC is the entity that "collects" the accident reports, and DOTD is the entity that "compiles" them into safety evaluation reports. Opp. 8-9. This "prepared-versus-collected" distinction is reminiscent of the discredited "collected-versus-compiled" distinction that was drawn in *Wiedeman* and rejected by Congress with the 1995 amendment to Section 409.

Respondents' argument improperly assumes that there can be only one stage of "collecting" or "compiling" data or reports for safety purposes. To the contrary, there are multiple stages, including accident report preparation as well as subsequent use of the reports.

The process of "preparing" the accident reports involves obtaining and assembling the various items of information on the accident report form from observations, witness statements, and other sources into a single accident report. *See* Accident Reports, Exhibits 1 and 2; MODEL MINIMUM UNIFORM CRASH CRITERIA, Exhibit 3. The police "collect" and then "compile" scores of data items into each accident report. Referring to this process as "preparing" the accident reports does not change these facts.

C. Plaintiffs do not need to introduce accident reports regarding other accidents in order to establish DOTD's notice of a defect.

Respondents claim that Section 409 should be interpreted as not applying to accident reports because such application would preclude plaintiffs from meeting their burden under LA. REV. STAT. ANN. 9:2800 of proving that

DOTD had knowledge of alleged highway defects. Opp. 3. This argument is a red herring.

The basis alleged by Respondents for DOTD's liability in this matter is the design of the intersection of U.S. Highway 90 and Louisiana Highway 88. Respondents complain that this design improperly omitted an overpass, incorporated a curve that impaired drivers' view of cross-traffic, set a speed limit that was too high, and used a stop sign instead of a stop light. Plaintiffs' Petition, ¶¶ 9-12.

It is nonsense to suggest that Respondents need accident reports to establish DOTD's knowledge of the defects they have alleged. DOTD obviously knows that there is no overpass at the intersection. Just as obviously, DOTD knows that there is a (very slight) curve on the U.S. 90 approach. If these features (or the speed limit or stop sign) were negligently designed, as Respondents allege, then an examination of the applicable design standards would bear this out. The requirement of notice to a governmental entity is inapplicable where the entity itself (or its contractor) *created* the allegedly defective condition. *See Whatley v. City of Winnfield*, 802 So.2d 983, 986 (La. App. 2 Cir. 12/5/01), *writ denied*, 811 So.3d 939 (La. 3/22/02); *Pickens v. St. Tammany Parish*, 323 So.2d 430, 433 (La. 12/8/75).

Proof of DOTD's knowledge of a hazardous condition is necessary only in cases where neither DOTD nor its contractor created the condition, such as where vegetation has overgrown a stop sign, a warning sign has been knocked down or stolen, or a highway shoulder has eroded. *Whatley*, 802 So.2d at 986; *Pickens*, 323 So.2d at 433. Even in such cases, DOTD's Maintenance Standards Manual requires the department to inspect all highways every two

weeks, providing either actual or constructive knowledge of defects created by others.[1] *See Duffy v. State ex rel. Dept. of Transp. & Dev.*, 95-1398 (La. App. 1 Cir. 2/23/96), 668 So.2d 1349, 1353. Respondents do not need six years of accident data to prove their case, if they have one.

D. The literal terms of Section 409 should not apply to the accident report for the accident at issue in a particular case.

Applying Section 409 to accident reports makes sense. Otherwise, plaintiffs could use accident reports to establish the sheer number of other accidents at the same location, but DOTD would be precluded from introducing safety evaluation reports demonstrating that the accident rate at that location is actually low, or supporting DOTD's decision to prioritize limited highway safety funds by upgrading safety facilities first at other, more accident-prone locations. Congress cannot have intended such an unfair imbalance. Alternatively, DOTD would have to waive the protection of Section 409 in many or most cases by introducing the reports that place the raw accident numbers into proper context. In turn, this would defeat the universally-acknowledged purpose of Section 409 of preserving candor, since the evaluator would have to assume that his reports might someday have to be used in

[1] DOTD did raise LA. REV. STAT. ANN. 9:2800, along with another statutory limitation on governmental liability, in its Answer; and to the extent Respondents seek to establish liability based upon a maintenance problem or an alleged defect created by someone else, its restrictions will apply.

litigation. Congress cannot have intended to defeat its own purpose in enacting the statute.

However, Respondents raise an important point when they note that Section 409 as written would bar discovery or consideration of the accident report for the very accident that is the subject of the lawsuit.[2] Opp. 11.

While accident reports themselves are generally inadmissible, photographs, blood tests, witness statements, and other items contained in accident reports are frequently used in lawsuits. In fact, this may be the only, or at least the primary, direct evidence about the accident. Thus, applying Section 409 literally could deprive all automobile accident litigants (both plaintiffs and defendants) of evidence *of their own accident*. A literal application would make such litigation nearly impossible, which *would* be an absurd result, and was certainly not the intent of Congress

This Honorable Court has previously recognized that it can limit the literal terms of a statute to avoid a truly absurd result that is "so gross as to shock the general

---

[2] Respondents actually argue that Section 409 applies *only* to the accident report for the accident at issue in a given case. Opp. 8. Respondents apparently reach this bizarre result by misconstruing the description of the types of *actions* where the statute applies (those arising from any occurrence at a location mentioned therein), as if this description related instead to the types of *reports* to which it applies. Correctly construed, Section 409 applies to all accident reports involving the *location* where the accident in a given case occurred, not just accident reports involving the *accident* at issue.

Interestingly, Respondents appear to concede that Section 409 *can* apply to accident reports, though they mistakenly argue that it applies *only* to the accident report for the accident at issue.

moral or common sense," where "there is something to make plain the intent of Congress that the letter of the statute is not to prevail." *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930).

For example, the Court applied this principle where a sheriff was charged with violating a federal criminal statute forbidding obstruction of the mail, when the sheriff arrested a mail carrier who had been indicted for murder. *U.S. v. Kirby*, 74 U.S. 482, 486-87 (1868). The Court found that the statute had no exclusion for obstructions due to lawful acts, *i.e.*, carrying out an arrest warrant. *Id.* at 486. Nevertheless, the Court refused to apply the statute to obstruction of the mail caused by arresting the carrier indicted for murder, because "the common sense of man" requires such a limitation. *Id.* at 487.

It would similarly be an affront to common sense to apply Section 409 to the accident report for the accident at issue, and therefore the statute should not be applied in this manner. Nor does it appear that Congress intended such a result. *Wiedeman*, which the 1995 amendment was enacted to reverse, excluded accident reports for *other* accidents from Section 409, not the report for the accident at issue. 627 So.2d at 173. It is the use of the accident reports for other accidents that Congress sought to preclude. This is precisely the type of situation where this Court has recognized that it can and should carve out an exception to the literal language of a broadly-drawn statute to avoid an absurd and unintended result.

E. Section 402(k) also protects accident reports.

Respondents urge that Section 402(k) applies only to the accident report for the accident at issue in a given

case. As with Respondents' similar argument regarding Section 409, addressed at footnote 2 above, this reasoning misconstrues the statute. The limitation on the types of *actions in* which the statute applies (arising out of any matter mentioned in the report, *etc.*) does not govern the types of *reports to* which it applies. Rather, like Section 409, Section 402(k) applies to *all* accident reports, and should be judicially constrained so that it does not apply to the report for the accident at issue in a given case.

CONCLUSION

For the foregoing reasons, and those set forth in DOTD's Petition, *certiorari* is warranted in this case.

Respectfully submitted,

HON. RICHARD P. IEYOUB
Attorney General
State of Louisiana

LAWRENCE A. DURANT
General Counsel
Department of Transportation and Development
State of Louisiana

WILLIAM M. HUDSON, III
PATRICK B. MCINTIRE
Counsel of Record
LAWRENCE E. MARINO
OATS & HUDSON
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
Gordon Square, Suite 400
100 East Vermilion Street
Lafayette, LA 70501
Telephone: (337) 233-1100

Attorneys for Petitioner